In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, APPELLANT,
v.
THE AMERICAN TOBACCO COMPANY ET AL. } No. 660.

THE AMERICAN TOBACCO COMPANY ET AL., appellants,
v.
THE UNITED STATES. } No. 661.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

This cause was instituted under the act of July 2, 1890—the antitrust law. It was therein alleged that the American Tobacco Company and more than 60 other individual and corporate defendants were parties to contracts, combinations, and conspiracies in restraint of trade and commerce in leaf tobacco, products manufactured therefrom, and articles necessary or useful in connection therewith, amongst the States and with foreign nations, and that they had monopo-

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lized or were attempting to monopolize a part of such trade and commerce. The Government asked that further violations of the law be enjoined and prohibited in appropriate ways specifically pointed out.

Acting under authority of the act of February 11, 1903, "To expedite the hearing and determination of suits in equity * * * under the act of July 2, 1890," etc., the Attorney-General filed a certificate stating that in his opinion the cause was of general public importance, and thereafter the same was proceeded with as directed by the expediting act. It was heard before the four circuit judges of the second circuit in May, 1908, and their opinions were handed down on the 7th of November last. The final decree, entered December 15, 1908, dismissed the petition as to certain defendants; adjudged that some of them are parties to combinations in restraint of trade and commerce, and enjoined them from continuing therein; that some are themselves combinations in restraint of trade and commerce, and enjoined them from engaging in that commerce; and that some hold stock in others, and enjoined the exercising of control over the companies which issued the stock and the latter from permitting such control, etc. (Copies of the decree are submitted herewith.)

The final decree directed that in case the defendants should at once appeal to this court the injunction should be suspended pending the same. Both sides have appealed and the record has been duly filed and printed.

The cause is one of those the expediting of which is provided for by the act of February 11, 1903, and, moreover, is of great and general importance. It involves difficult questions relating to industrial combinations as affected by the act of 1890, and its early determination is very desirable.

In behalf of the Government we respectfully ask that the cause be advanced and assigned for hearing as soon as the convenience of the court will permit.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

FEBRUARY, 1909.

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In the Supreme Court of the United States,

OCTOBER TERM, 1909.

THE UNITED STATES OF AMERICA, Appellant,
v.
THE AMERICAN TOBACCO COMPANY AND OTHERS. } 816.

THE AMERICAN TOBACCO COMPANY AND OTHERS, Appellants,
v.
THE UNITED STATES OF AMERICA. } 817.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

I.

Outline of the Case.

This is a proceeding against The American Tobacco Company, its officers, directors and affiliated corporations, seeking "to prevent and restrain" monopolies and restraints of commerce in tobacco and related commodities in violation of the Sherman Act (26 Stat., 209) and certain provisions of the Wilson Tariff Act (28 Stat., 570). (The statutes are Appendixes "A" and "B" hereto.)

The original petition was filed July 10, 1907, in the United States Circuit Court at New York; the answers in October, following. An Examiner was appointed; voluminous proofs were taken; the Attorney-General certified that the case was important; it was argued in May, 1908, before four Circuit judges; and November 7, following, opinions were filed, three judges concurring, one dissenting. The final decree (December 15) enjoined certain corporate defendants and dismissed the petition as to the others. Cross-appeals were taken, errors assigned, the record filed here (Dec. 23, 1908); and on the Government's motion the cause was advanced.

A general outline (details appear later) of the salient facts and issues follows—

Defendants are The American Tobacco Company, its officers, directors, and sixty odd affiliated corporations, organized in different States (generally New Jersey), except the British-American Company and Imperial Company which are English; and they are engaged in the manufacture of and interstate and foreign commerce in leaf tobacco, its products, and related articles. Their business extends to all parts of the United States and throughout a large part of the world.

The American Tobacco Company, through stock ownership, controls all corporate defendants except the Imperial Company—English Combination (Gov. Ex. 87, R. V), and in this it is a large stockholder and selects three directors. Since 1902 commerce in to-

bacco throughout the world has been apportioned by written agreement between the two, executed in England; and under the express terms of this arrangement the British-American Company was organized to carry on the business beyond the United States and England theretofore conducted by the contracting parties in competition.

Leaf tobacco grows in twenty-five States, is of radically different types, with many grades; and is principally used for cigars, cigarettes, snuff, chewing and smoking tobacco, each of which, speaking broadly, belongs to a separate department of trade. The average annual domestic production for ten years has been around 800,000,000 pounds, with downward tendency; the demand has steadily increased. The cigar type (180,000,000 annually) grows in the Northern States; the greater portion of the others in Kentucky, Virginia and North Carolina.

Prior to 1890, in different States and abroad, many independent concerns manufactured and traded in tobacco and related articles—the result of growth and development along ordinary lines. Each was mainly devoted to cigars, cigarettes, snuff, chewing, or smoking tobacco, but frequently more than one of these was produced. Some were financially strong, with large output, but no one controlled a very great share of the whole, and there was active, unrestricted competition among them as buyers and vendors. Leaf was purchased in the States where it grew, transported to the factories and converted into articles for consumption;

and in the usual way through drummers, agents, representatives and dealers these were sold and distributed throughout the United States and abroad. Like conditions prevailed with respect to licorice, tin-foil, containers, boxes and other related articles.

Some thirty years ago manufacturers began to pack tobacco products in small parcels, marked with distinctive names or *brands,* to be retailed at five cents or some multiple, and by advertisement and otherwise sought to popularize these. As a result, the business became "a matter of brands" and the leading ones highly important, indispensable indeed, to jobbers and retailers. The success of a brand depends primarily on a secret formula and advertisement; it may be acquired from the originator and manufactured by others without loss of public favor.

Prior to 1890, five concerns with plants in North Carolina, Virginia and New York purchased the necessary leaf (less than 15,000,000 pounds annually) and manufactured, sold and distributed here and abroad in the usual ways 5,000,000 pounds of smoking tobacco annually (less than 8 per cent. of the whole) and 97 per cent. of all cigarettes (all the popular brands). They had large interstate and foreign trade and were sharp competitors as buyers and sellers. Under leadership of defendant James B. Duke the owners of these determined to combine. Accordingly, in January, 1890, they organized the original American Tobacco Company, of New Jersey, with broad powers and $25,000,000 capital (increased in 1891 to $35,000,000; in

1899 to $70,000,000), which thereupon took over the business, assets, etc., of all (but without covenants against future competition), issuing therefor its entire share capital in agreed proportions; and their managers or owners became its officers and directors. The competition theretofore existing was at once destroyed and a monopoly of the cigarette trade established.

The new company was immediately successful; the parties interested determined to extend its operations; and with enlarging purpose to restrain trade and acquire monopolies they actively entered upon the plan (since pursued) of acquiring plants, assets, etc., of other manufacturers and dealers in tobacco (including all varieties), giving therefor cash or stock and taking from the owners, stockholders and managers contracts obligating them not to compete. In pursuance of this purpose they constantly practiced unfair trade methods and exercised duress. Acquired plants were generally closed; the brands were sometimes utilized, more often allowed to die; and the interests formerly competing acted in harmony.

Seeking an ever-increasing proportion of the trade, The American Tobacco Company came into fierce conflict with other manufacturers and vendors—especially those of plug; and between 1892 and 1898 the "plug war" was waged, during which very large sales were made by it below cost and at tremendous loss. The competition was especially sharp between The American Tobacco Company, P. Lorillard Company, of Jersey City, the P. J. Sorg Company, of Ohio, John Finzer & Brother, of Louisville, Daniel Scotten & Com-

pany, of Michigan, J. Wright Company and P. H. Mayo & Brother, of Richmond, and the Brown and Drummond Tobacco companies, of St. Louis—all old, strong, well established. To destroy this the parties by agreement (1898) caused the organization in New Jersey of Continental Tobacco Company with broad powers and $75,000,000 capital (increased April, 1899, to $100,000,000). By issuing stock this company at once acquired control of P. Lorillard Company, since continued as a separate organization; received conveyances of plants, assets, etc., of others; and took from the vendors and principal shareholders agreements not to engage in the tobacco business. The American Tobacco Company transferred the assets, brands, good-will, etc., appertaining to its plug business in exchange for $30,274,200 stock, $300,000 cash, and the losses sustained in that department during 1898—$840,035; and James B. Duke, its president, became president of the new company.

Paying therefor in cash or stock the Continental Company rapidly obtained control of the remaining important plug competitors (requiring of vendors agreements not to engage in the business), and in a short time completely dominated the trade and so continued until the merger of 1904, hereafter described.

About 1898 the Continental and American companies actively entered upon the policy (since pursued) of securing control of competitors by acquiring the majority shares of going companies or by causing subsidiary corporations to be organized (usually in New Jersey), which by prior agreement immediately took

over competing business of others. In these ways scores of competitors were acquired. The relationship was sometimes known, but often denied. Secret ownership and operation were not abandoned until exposed (1907) in connection with this proceeding.

Prior to 1900, the Continental and American tobacco companies were manufacturing, selling and distributing snuff—their joint output in 1899 was 5,000,000 pounds. Between them and the Atlantic Snuff Company (annual output 5,000,000 pounds), itself incorporated to unify competitors, and other large producers, there was sharp competition. Early in 1900, by preliminary agreement, the American Snuff Company was organized in New Jersey with $25,000,000 capital, and immediately took over the snuff business of the several concerns, with covenants against future competition, issuing in payment stipulated amounts of stock. This company then began to acquire the business or stock control of others, for its stock or cash, and has continued that policy. In 1907 its output was 22,067,234 pounds—96 per cent. of the total for the United States. No relatively important independent domestic manufacturer of snuff remains. The American Tobacco Company and affiliated corporations own 40 per cent. of the snuff company's stock; for many years have controlled stockholders' meetings and dominated its affairs; and complete unity of action prevails.

In the spring of 1901, the United Cigar Stores Company was incorporated in New Jersey, with $2,500

paid up capital, by parties not connected with the "Trust," to sell and distribute tobacco products at retail (R. III, 100). In November following, The American Tobacco Company acquired control, and has since financed and supported it—supplying enormous sums; but for a long time the relationship was secreted and denied. The share capital now outstanding is $1,650,000—bonds $2,850,000; three-fourths of the former and all of the latter are held by The American Tobacco Company. The United Company conducts retail stores in large cities and receives special inside prices and active aid from other defendants. The consequent growth has been phenomenal; sales at retail in 1907 amounted to $16,000,000 (R. III, 109). Through this company defendants are seeking dominion in retailing tobacco products, an avenue absolutely necessary to effective competition. It is engaged in interstate commerce; has bought out dealers, taking agreements not to engage in retailing tobacco, forced out others, etc., and through its connection is now too powerful for any ordinary competitor to withstand.

Licorice paste, essential in the manufacture of tobacco, is made from an oriental root. Prior to 1902, many imported the root, produced, sold and distributed the paste—all in competition. The Continental Tobacco Company, seeking this business, caused the organization of its subsidiary, MacAndrews and Forbes Company, with capital of $7,000,000. The latter, by a series of purchases and combinations, in 1902 became dominant in the trade. Its only important competitors

were J. S. Young Company, of Baltimore, and J. D. Lewis, of Providence, and in 1903 they all agreed not to compete. Secretly the Young Company through ownership of stock came under control of MacAndrews & Forbes, but was advertised and held out as independent. In 1906 the corporations were indicted for violating the Sherman Act and afterward convicted. MacAndrews & Forbes after the indictment acquired all shares of the Young Company, took a conveyance of the business, plant, etc., and now has a monopoly and is without a formidable rival. The business of Lewis is small and dependent on the combination for raw material. In 1907 the domestic output of licorice paste was 40,000,000 pounds, of which MacAndrews & Forbes Company manufactured, sold and distributed 95 per cent. It has agreements to supply at remunerative prices all defendants, and they use most of the world's output.

Prior to 1901, The American and Continental companies manufactured and sold cigars, stogies and cheroots; Powell, Smith & Company, of New York, were competitors. These determined to combine through a corporation and use it to dominate the trade. Accordingly, in January, 1901, they organized the American Cigar Company (of New Jersey) with capital of $10,000,000 (afterwards $20,000,000), of which the American and Continental companies each took 46½ per cent. and Powell, Smith & Company 7 per cent. (The American Company now holds $16,000,000 stock and $10,000,000 notes), and all conveyed their cigar, etc.,

business, with agreements not to compete. The new company, following the usual methods, acquired control of concerns in the United States, Cuba and Porto Rico, taking from owners and directors covenants against competition. In Cuba and Porto Rico, through the Havana Tobacco Company and the Porto Rican-American Company, the Cigar Company occupies a dominant place. In 1907 its domestic output (subsidiaries included) of cigars, etc., was 1,039,822,996—14 per cent. of the total. It has many important subsidiary companies, including dealers.

Tinfoil, chiefly used for packing tobacco products, was formerly produced by many independent manufacturers. The American and Continental companies and subsidiaries became the chief users of it (requiring some two-thirds of total output) and desired to control the trade. In 1899, through agreement with John Conley & Son, large producers, the Conley Foil Company was formed and took over the partnership's business. The American Company secured a majority of the stock; and the new corporation has since acquired one or more competitors and greatly extended its operations. It now furnishes foil to the allies under profitable contracts, and produces 75 per cent. of the 22,000,000 pounds annually manufactured in the United States. Only one substantial competitor maintains a precarious existence.

The defendants are engaged through divers companies in the manufacture of and commerce in sundry articles more or less connected with the tobacco busi-

ness, such as containers, boxes, machinery, extracts, germicides, pipes; and also in jobbing, retailing, planting, etc.

In June, 1901, certain officers and directors of The American and Continental companies, in order to supply additional funds and to secure dominion over both, organized the Consolidated Tobacco Company, a holding corporation, with $30,000,000 capital (afterwards $40,000,000), a slight majority of which was always held by six individuals—James B. Duke and others. By issuing bonds and manipulating securities this holding company at once obtained controlling shares of the two old companies and held them until the merger of 1904. All had the same President and operated with a common purpose.

In 1903, by preliminary agreement, the American Stogie Company was incorporated to combine the stogie business of competing concerns and to that end has been manipulated in the usual ways. Of its $11,976,000 stock, the American Cigar Company holds $7,307,200.

Purchasing supplies for the allied companies (except leaf tobacco) became so important that defendants in 1903 caused the organization of the Amsterdam Supply Company. Its stock was divided amongst them and they in turn agreed to buy through it. Its annual purchases amount to more than $25,000,000, and possible competition between its stockholders is prevented.

For many years, strong independent competing concerns in Great Britain bought large quantities of American leaf tobacco, converted it into finished products, and sold and distributed them throughout the world, including the United States. The American Tobacco Company had long done business in England, and in 1901 undertook vigorous measures to increase it. The strong British companies, becoming alarmed, in December, 1901, organized the Imperial Tobacco Company with capital of 15,000,000 pounds sterling (afterwards 18,000,000), which immediately took them over, and there followed a fierce commercial conflict throughout the world between it and the American combination.

In September, 1902, the Imperial and the American companies entered into contracts (executed in England) stipulating that the former should limit its business to the United Kingdom, except purchasing leaf in the United States (it buys 54,000,000 pounds annually); that the American companies should limit their business to the United States, its dependencies and Cuba; and that the British-American Tobacco Company, with capital of 6,000,000 pounds sterling divided between them, should be organized, take over the export business of both, and operate in other countries, etc. This arrangement was immediately put into effect and has been strictly observed; the interests of the Imperial and American companies were thus combined and motive for competition destroyed.

After the Northern Securities case it appeared expedient to change the relations of the Consolidated,

American, and Continental tobacco companies; and, proceeding under a New Jersey statute, in 1904, the three were merged under the name of The American Tobacco Company, which has since carried on the business of all and has acquired control of competitors and extended its operations along the general lines above described.

The numerous controlled companies regularly report to the central office of The American Tobacco Company and all are operated in harmony.

The necessary leaf for defendants is purchased under a common oversight by agents in all important districts, directly from the grower or at central markets, then shipped to warehouses and factories as a part of commerce. Their purchases of domestic leaf in 1905 (since increased), including 50,000,000 by the Imperial Company, amounted to 468,000,000 pounds—about twenty per cent. of the cigar type and more than two-thirds of all others—of some more than eighty per cent.

Defendants have acquired most of the leading brands of manufactured tobacco and are in position to control the avenues of distribution. Their products are advertised and sold through an army of representatives operating throughout the United States, whose detailed reports keep the central office advised of conditions in every locality. Immense sums are spent in advertising and distributing free goods—$10,000,000 by The American Tobacco Company alone in 1906. Through covenants many owners and managers of successful concerns have been retired from the trade and possible competition from them destroyed.

The combined assets of the allies exceed $400,000,000.

Their domestic output of manufactured tobacco in 1907, with percentages of totals, follow. [For output for each year since 1890, see Appendixes "F" to "M" hereto.]

		Defendants' Output.	*Per Cent.*	*Total United States.*
Cigarettes (for domestic sale)	(No.)	3,925,506,700	73.9	5,309,158,177
Cigarettes (*a*) (for export)	(No.)	1,805,117,150	(100?)	
Smoking	(Lbs.)	127,638,531	71.2	179,172,512
Plug & Twist	(Lbs.)	137,207,883	79.7	172,002,513
Fine Cut	(Lbs.)	10,115,315	81.1	12,457,917
Little Cigars	(No.)	954,001,460	89.2	1,069,215,111
Snuff	(Lbs.)	22,067,234	96.1	22,960,038
Cigars	(No.)	1,039,822,996	14.1	7,353,221,840

(a) This is manufactured for export in bonded warehouses, Class 6, and is not included in the lump figures showing exports in recent Annual Reports of the Internal Revenue Bureau. For fiscal year 1906—total export cigarettes was 1,710,939,000; for 1907—1,998,095,000 (Com. & Nav., U. S. 1907, p. 768). British-American produced in bonded warehouses, Class 6, for calendar year 1906—cigarettes, 1,912,532,900; for 1907—1,805,117,150. The Reports Comr. Int. Rev. (1906, p. 110; 1907, p. 67) show that there was exported from the United States cigarettes weighing less than 3 lbs. to the thousand and not made in Class 6 warehouses for fiscal years 1906 and 1907—96,057,700 and 48,593,500. There is nothing to show who manufactures the exports not made in bonded warehouses; but Vice-President Harris said *nearly all* the tobacco products sent abroad are produced by defendants.

Defendants are parties to contracts, combinations and conspiracies in restraint of commerce, have monopolies of tobacco products (except cigars), licorice and tin-foil, and have destroyed competition and obtained undue power in commerce in cigars, boxes, cloth containers, tobacco extracts, jobbing, retailing, etc.; they are also engaged in the manufacture of machinery,

pipes, smokers' supplies, in advertising schemes, insurance, planting, etc. Enormous profits have accrued; and defendants James B. Duke and associates have been the leaders in bringing about the present status.

The defendants have persistently exercised duress, have practiced wicked and unfair methods, and used their great power in oppressive ways; and they have been actuated by a fixed purpose to destroy competition and obtain monopolies. Competitors have gradually disappeared, and the combination, now strongly entrenched, unduly restricts the business of those in the trade and prevents others from entering.

The Petition sets out the facts with circumstantiality and alleges an expanding accomplished purpose to restrain commerce and acquire monopoly. It prays that the arrangements amongst defendants be declared illegal and that they be enjoined; that the Imperial Tobacco Company be prohibited from doing business in the United States until the unlawful agreements between it and the American companies are rescinded; that the British-American Tobacco Company be adjudged an instrument for effectuating an unlawful arrangement, and be enjoined; that The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, MacAn drews & Forbes Company, and The Conley Foil Company be adjudged unlawful combinations and in possession of monopolies and be enjoined from carrying on interstate or foreign commerce; and that holding stock by one defendant corporation in another be prohibited.

The Imperial Company claims that it is a foreign corporation; that the agreements with the American companies were lawful in England where made (its answer contains no such averment); that no material restraint of trade resulted from them; that if any did occur it was occasioned by *bona fide* sales of property in due course. The British-American Tobacco Company claims it is a foreign corporation legitimately organized to buy property and that it does not operate in conflict with law.

The other defendants deny purpose to restrain or monopolize commerce; maintain that State charters gave the corporations the right to purchase the property acquired; that they are engaged in manufacture and any combination amongst them relates only thereto; and that none of them has acquired a monopoly.

The decree dismissed the petition as to the individual defendants, the United Cigar Stores Company, the Imperial Tobacco Company, and the British-American Tobacco Company and its subsidiaries; adjudged the other defendants parties to combinations in restraint of commerce and enjoined them; adjudged The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company and MacAndrews & Forbes Company unlawful combinations and enjoined them from engaging in interstate commerce; and prohibited the control of certain defendants by others through stock ownership, etc. Injunction was suspended pending appeal.

II.

Contracts, combinations and monopolies which directly and materially hindered or obstructed interstate or foreign commerce were unlawful prior to the Act of July 2, 1890.

The American Tobacco Company began business in January, 1890, prior to the Sherman Act. Nevertheless it appears desirable to show its original status was unlawful and that present conditions are not the mere orderly outcome of an enterprise rightfully undertaken.

Two lines of reasoning support the proposition—

(A)

In *Western Union Telegraph Company* v. *Call*, 181 U. S. 92, 102—a suit seeking damages for unlawful discrimination—the Telegraph Company unsuccessfully claimed that no liability could be enforced because the complaint related to interstate commerce subject to regulation by Congress alone, and there was no applicable Federal statute. Speaking by Mr. Justice Brewer, this Court said—

> Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions. * * * *

Beyond serious doubt, without Congressional enactment, every contract, agreement, combination or

monopoly, unlawful at common law, would be so regarded by the Federal courts although it related solely to interstate or foreign commerce. And certainly no court would affirmatively aid the purposes of any of them. "There is no doubt that * * * 'at common law every person has individually, and the public also has collectively, a right to require that the course of trade shall be kept free from unreasonable obstructions'" (Loewe *v.* Lawlor, 208 U. S., 294).

(B)

The Constitution gives Congress power "To Regulate Commerce with Foreign Nations, and Among the Several States, and with the Indian Tribes." Except as limited by other provisions, this power is supreme and cannot be abridged by State, individual or corporation.

In *Leisy* v. *Hardin,* 135 U. S., 100, the Chief Justice, speaking for the Court, laid down the following propositions—

> (109) Inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled.
>
> * * * * * * *
>
> (119) Where the subject matter is national in its character, and admits and requires uniformity of regulation affecting alike all the States, such as transportation between the

> States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.
>
> * * * * * * *
>
> The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce.

In *Vance* v. *Vandercook,* 170 U. S., 438, 444, this Court, speaking by Mr. Justice White, said—

> Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a State law which denies such a right, or substantially interferes or hampers the same, is in conflict with the Constitution of the United States.

(See also—*Re Rahrer,* 140 U. S., 545; *Rhodes* v. *Iowa,* 170 U. S., 412; *Adams Express Co.* v. *Kentucky,* 206 U. S., 129, 135; *Atlantic Coast Line* v. *Whorton,* 207 U. S., 328, 334; *Adams Express Co.* v. *Kentucky,* 214 U. S., ——, *May* 24, 1909.)

The doctrine that Congressional inaction concerning interstate and foreign commerce is equivalent

to a positive declaration that it shall be "free and untrammeled" and that whatever "substantially interferes with or hampers the same is in conflict with the Constitution of the United States" rests upon the intention of Congress "reasonably implied from its silence in respect to the subject of commerce." (*Bowman* v. *Chicago, &c., R. R. Co.,* 125 U. S., 465, 482).

Within settled principles of the common law, contracts, combinations, conspiracies and monopolies may prevent the free flow of commerce—substantially interfere with and hamper the same.

If a State statute which hampers or substantially interferes with commerce is invalid, because in conflict with the contrary intention of Congress reasonably implied from its silence, *a fortiori* must this be true of arrangements by corporations which bring about like results.

A State by legislation cannot directly obstruct commerce and certainly cannot so empower a corporation. Obviously also, combinations of individuals or corporations have no right so to do; otherwise the declaration by Congress that commerce shall be free could be nullified and its supremacy would not exist. It follows that even in the absence of express legislation all arrangements which directly and materially restrain or obstruct interstate or foreign commerce would be unlawful.

In *Re Debs,* 158 U. S., 564, 577, 599, the United States finding interstate transportation of persons and property and carriage of the mails forcibly obstructed, and that a combination and conspiracy existed to sub-

ject them to the will of the conspirators, applied to a court of equity to restrain the obstruction and prevent the carrying of the conspiracy into effect. This Court held that the Constitution imposes upon the national government the duty to keep the avenues of commerce free; that in the absence of positive Congressional legislation obstructions upon the highways to the passage of interstate commerce were unlawful and the Government could appeal to the courts to remove them. A sweeping injunction was accordingly upheld.

Speaking for the Court, Mr. Justice Brewer said—

> (581) It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this Court the question presented was of the validity of State legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

(See also *Union Bridge Co.* v. *U. S.*, 204 U. S., 364; *Galveston R. R.* v. *Texas*, 210 U. S., 217; *Caldwell* v. *N. C.*, 187 U. S., 622.)

We submit that before the Act of 1890, contracts, combinations and monopolies which in effect or necessary tendency directly and materially obstructed, hindered, burdened or restrained interstate or foreign com-

merce were unlawful. It is unnecessary to discuss what powers the courts then had to prevent them by affirmative action or whether parties thereto were guilty of criminal offences.

III.

The anti-trust provisions of the Wilson Tariff Act (1894) apply to any combination or agreement intended to restrain free competition when one of the parties is engaged in importing.

These provisions—Sections 73 to 77 (Appendix B)—have not been construed by this Court. They declare illegal every combination, conspiracy, trust, agreement or contract, one party to which is engaged in importing, when intended to restrain lawful trade or commerce or free competition therein, or to increase the market price of any article imported or intended to be imported or any manufacture into which such imported article enters or is intended to enter. The language declaring what is unlawful differs in some respects from the Sherman Act—not improbably because of certain opinions of the lower Federal Courts concerning it. (*In Re Green,* 52 Fed., 104; *United States* v. *Trans-Missouri Freight Ass'n,* 53 Fed., 440; 58 Fed., 58; *United States* v. *E. C. Knight Co.,* 60 Fed., 934).

The things denounced must, of course, directly relate to and materially affect interstate or foreign commerce; and so construed, we submit the provisions are valid.

The manifest object was to prohibit arrangements destructive of free competition, and in this regard the later act accentuates the purpose of the earlier one.

IV.

The Sherman Act prescribes the rule of free competition in its broad and general sense and denounces contracts, combinations and conspiracies in whatever form which in effect or necessary tendency directly and materially obstruct interstate or foreign commerce. The natural effect of competition is to increase commerce; to extinguish or prevent the free play of competition is to hinder it.

The rights of an individual acting alone are not involved in the present controversy and discussion of them will not be entered upon. (Opinion of Mr. Justice Brewer in Northern Securities Case.)

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal." (Sec. 1.)

No attempt will be made to point out the exact bounds of the anti-trust statutes. But we will undertake to show that the Record reveals gross violations of them within any construction consistent with repeated decisions of this Court; and indeed within any interpretation ever announced by a member of this Court. If the express terms of the Sherman Act limited its prohibitions to *unreasonable* restraints of commerce, the present case would be clearly within it. If duress, oppression, wicked and unfair methods are essential, they all appear. Unless industrial combinations and monopolies brought about through corporations are exempt, the defendants are in flagrant conflict with the law. The defendants' actions have direct reference to interstate and international commerce and essentially obstruct the same.

"Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this Court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted." (*Hopkins* v. *United States,* 171 U. S., 578, 597; *Swift & Company* v. *United States,* 196 U. S., 375.)

"Regulation and commerce among the States both are practical, rather than technical, conceptions, and, naturally, their limits must be fixed by practical lines." (*Galveston R. R.* v. *Texas,* 210 U. S., 217, 225.)

"Transactions between manufacturing companies in one State, through agents, with citizens of another, constitute a large part of interstate commerce." (*Caldwell* v. *North Carolina,* 187 U. S., 622, 632; *Rearick* v. *Pennsylvania,* 203 U. S., 507, 512.)

A manufacturer who fabricates hats in Connecticut, sells and ships them to wholesalers in other States is engaged in interstate commerce, and a combination which directly and materially (essentially) hinders such business is an unlawful interference with interstate commerce. (*Loewe* v. *Lawlor,* 208 U. S., 274, 293.) See *Bement* v. *National Harrow Co.,* 186 U. S., 70, 92.

The anti-trust laws must be reasonably construed with a view to practical enforcement, and not so as to defeat the purposes leading to their enactment. "Noth-

ing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." (*Lau Ow Bew* v. *United States,* 144 U. S., 47, 59; *United States* v. *Joint Traffic Ass'n,* 171 U. S., 505, 567; *Hopkins* v. *United States,* 171 U. S., 578, 600; *Anderson* v. *United States,* 171 U. S., 604, 616; *Swift & Company* v. *United States,* 196 U. S., 375, 396; *Cincinnati Packet Company* v. *Bay,* 200 U. S., 179, 184.)

The validity of State legislation affecting interstate commerce turns upon whether its direct effect or necessary tendency is the materiai or substantial restraint, hindrance or obstruction of such commerce. If so, it is unconstitutional and good intent does not save it. But if the effect on commerce is only immaterial and incidental this will not invalidate the statute. (*Asbell* v. *Kansas,* 209 U. S., 251, 256; *Galveston, &c., R. R.* v. *Texas,* 210 U. S., 217, 227; *Minnesota* v. *Barber,* 136 U. S., 313, 319; *Richmond, &c., R. R. Co.* v. *Patterson,* 169 U. S., 311, 314; *Chicago, &c., R. R.* v. *Solan,* 169 U. S., 133; *Missouri, &c., R. R.* v. *Haber,* 169 U. S., 613, 626; *Bowman* v. *Chicago, etc., R. R. Co.,* 125 U. S., 465, 482; *Smith* v. *Alabama,* 124 U. S., 465, 473.) The same general principles enforced as to State statutes should be followed when violations of the anti-trust law are under consideration.

The Sherman Act applies when the direct result or necessary tendency of the prohibited thing is the material obstruction, hindrance or restraint of interstate

or foreign commerce. This thing need not be any part of commerce nor be done by parties engaged therein (*Loewe* v. *Lawlor*). Whether such obstruction, hindrance, restraint or tendency exists must be determined by the court in each case presented upon all the facts in evidence; conclusion should depend upon practical, not mere theoretical considerations, and necessarily will be influenced by the status of commerce at the time. That which did not restrain commerce fifty years ago may do so to-day (*Union Bridge Company* v. *United States,* 204 U. S., 364, 400; *Pennsylvania* v. *Wheeling Bridge Co.,* 13 How., 518, and 18 How., 421).

Persons of sound mind are presumed to intend the necessary or ordinary consequences of their acts (*Clarion Bank* v. *Jones,* 21 Wall., 325, 337); and, in general, the intent or purpose consciously entertained or dominant in the minds of the parties to a combination is not material—certainly is not decisive of its legality. Where attempts to monopolize are charged, or where it is essential to show a plan not necessarily inferred from the circumstances, or where the effect of established acts may be doubtful, the actual conscious purpose of the parties may be material—perhaps essential. (*U. S.* v. *Trans Mo. Ft. Assn.,* 166 U. S., 290, 341, 342; *Addyston Pipe Co.* v. *United States,* 175 U. S., 211, 234; *Swift & Co.* v. *United States,* 196 U. S., 375, 396).

The E. C. Knight Case turned upon the conclusion by the Court that what was alleged and proved did not

directly or necessarily obstruct interstate commerce; and may be relied upon only where the evidence requires a like finding on that point.

A combination is "the union or association of two or more persons (or corporations) for the attainment of some common end" (Century Dictionary; Noyes on Intercorporate Relations, Sec. 302).

A conspiracy is sufficiently described as "a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means." (*Pettibone* v. *United States,* 148 U. S., 197, 203; *Noyes on Intercorporate Relations,* Secs. 324 *et seq.*)

It was strenuously urged below that the lawfulness or unlawfulness of a combination of competing concerns must be determined by the main or primary purpose of the parties; that if this is lawful then the actual destruction of competition becomes immaterial. But necessary consequences are presumed to have been intended; and moreover, the fundamental design of the legislation under consideration is not the punishment of immorality but prevention of mischief consequent upon the unification of business and destruction of competition. The public is chiefly concerned about practical results—not mental attitudes. The fallacy of this contention was long since declared by this Court. (*U. S.* v. *Trans Mo. Ft. Assn.,* 166 U. S., 290; *U. S.* v. *Joint T. Assn.,* 171 U. S., 562; *Addyston Pipe Co.* v. *United States,* 175 U. S., 211, 234.)

The word "reasonable" cannot be read into the first section of the Act and made to qualify "restraint." But this does not render the prohibitions applicable whenever commerce is in some way affected, or to transactions which before the statute were unobjectionable from any standpoint. To insist on a forced construction and then point out consequent impossible conditions is a device too obvious for success. This Court has never declared unlawful ordinary business arrangements always recognized as entirely proper at common law and wholly outside the mischief intended to be prevented—but distinctly to the contrary. (*United States* v. *Joint Traffic Ass'n,* 171 U. S., 505, 567, 568; *Hopkins* v. *United States,* 171 U. S., 578, 600; *Cincinnati Packet Co.* v. *Bay,* 200 U. S., 179.) Any act, however, although entirely innocent when standing alone may be criminal if part of an unlawful plan. (*Swift & Company* v. *United States,* 196 U. S., 375, 396; *Aikens* v. *Wisconsin,* 195 U. S., 194, 205.)

We do not maintain that restraint of commerce is denounced by the Sherman Act unless it is direct and material, either in tendency or effect; and, of course, do not insist that every contract or arrangement which causes the elimination of a competitor in interstate trade is necessarily unlawful. The statute was intended to foster, not destroy, business operations universally regarded as promotive of the public welfare.

Accordingly, we do not avouch and will not attempt to support the extreme construction of the Act adopted

by the Presiding Judge below under which he declared, in substance, that it would be unlawful for any two individuals driving rival express wagons between villages in contiguous States to combine forces by forming a partnership, or otherwise, and operate a single line; or by contract "to deprive the country of the services of any number of independent dealers, however small" (R. I. 291, 292).

Contracts, conspiracies or combinations which give power to restrain commerce or necessarily tend to monopoly are unlawful without more (*E. C. Knight Case; Northern Securities Case; Trans-Missouri Freight Ass'n Case*). The essential purpose of the statute is to prevent injury—not merely to reverse a course of conduct. The evidence, however, clearly shows that acting in concert the defendants have exercised coercion and duress and have practiced unfair, oppressive and wicked trade methods. See *post,* Part XI.

The opinions of this Court, which support the leading proposition announced above, denounce devices destructive of competition and negative the insistence in defendants' behalf, follow.

United States v. *E. C. Knight Company* (1895), 156 U. S., 1—

If this opinion has not been overruled in effect (as the minority in the Northern Securities Case seemed to conclude), certainly subsequent ones require that its authority be confined to precisely similar controversies where the same remedy is sought and the proof necessitates the same conclusion which the Court therein an-

nounced as to the effect of the assailed arrangement upon commerce.

The American Sugar Refining Company, engaged in manufacturing and selling sugar, by exchanging shares, acquired all stock of competing concerns at Philadelphia, and thereby control of the manufacture of 90 per cent. of the sugar refined and sold in the United States, and a monopoly of such manufacture. There were no covenants by vendors against competition; no stipulations in terms relating to commerce; and no concert of action amongst vendor stockholders in different corporations. "The relief sought was the surrender of property which had already passed and the suppression of monopoly in manufacture by the restoration of the *status quo* before the transfers."

The Chief Justice, speaking for the Court, said—

> (10) The monopoly and restraint denounced by the Act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life. * * * (11) The fundamental question is whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the Act of Congress in the mode attempted by this bill. * * * (12) The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a

large population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. * * * Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. * * * (17) The contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. * * * There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers, yet the Act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the Act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.

In the language quoted, the Court announced its conclusion that the evidence failed to show the transactions complained of directly or necessarily affected commerce. This, of course, necessitated dismissal of the bill. Justice Harlan thought that the proof did establish direct material obstruction to commerce and accordingly dissented. Referring to this case in *Loewe* v. *Lawlor,* the Chief Justice said "the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intent of the combination determined its legality."

Obviously the existence of direct material obstruction to commerce must be determined upon the proof presented in each case—the conclusion must vary with the circumstances. In the Northern Securities Case the Court held that direct obstruction was established by evidence apparently little more potent than that presented in the Knight Case, and the decree undertook to suppress the combination by prohibiting control and use of property which had already passed. In *Loewe* v. *Lawlor,* acts no part of commerce were declared unlawful because of their direct effect; and the same conclusion was also announced in *Swift & Co.* v. *U. S.,* 196 U. S., 375, 397.

The Chief Justice further said—

> (12) Power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

Some recent opinions discussing the Knight Case are—*National Fireproofing Company* v. *Mason Builders Ass'n*, 169 Fed., 259; *Pennsylvania Sugar Refining Company* v. *American Sugar Refining Company*, 166 Fed., 254; *Bigelow* v. *Calumet & Hecla Mining Company* (*Circuit Court of Appeals, Sixth Circuit*), 167 Fed., 704, 721. This Court in numerous opinions has pointed out its limitations and wherein it differs from cases like the present one.

Pearsall v. *Great Northern R. R. Co.* (1896), 161 U. S., 646—

Pearsall, a stockholder of the Great Northern Railroad Company, sought to enjoin execution of a contract which would have given it one-half the shares of the Northern Pacific Railroad Company, in alleged violation of the Minnesota statute prohibiting consolidation of parallel and competing lines. The proposed arrangement was declared unlawful and speaking for the Court, Mr. Justice Brown said—

> (670) It is true that upon its face the agreement contemplates principally an interchange of traffic between the lines under joint tariffs (by which is probably meant similar rates to be agreed upon between the parties) in order that the defendant may enjoy the right to ticket its passengers and consign its freight to points upon the line of the Northern Pacific, not reached by the Great Northern, and to that end is also to have the right to make use of the terminal facilities of the Northern Pacific at such points on the line as should be convenient to the defendant. If the sole object of this agreement

were to facilitate an interchange of traffic, so that each road might enjoy the benefit of billing its passengers and freight to points on the other road not reached by it, it would be difficult to foresee any objection to it. But the fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control of the Northern Pacific, is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured.

United States v. *Trans-Missouri Freight Association* (1897) 166 U. S., 290—

In 1889 a number of railroad companies formed themselves into the Trans-Missouri Freight Association "for the purpose of mutual protection by establishing and maintaining reasonable rates," etc. In 1892 the Government filed a bill to have the agreement declared illegal and the Association dissolved. It alleged that "contriving and intending unjustly and oppressively to increase and augment the said rates and prices * * * * and intending to monopolize the trade, traffic and commerce" they "did combine, conspire, confederate and unlawfully agree together, and did then and there enter into a written contract, combination, agreement and compact, known as a memo-

randum of agreement of the Trans-Missouri Freight Association."

The answers admitted formation of the Association, but expressly denied unlawful intent or purpose, and alleged that defendant's proper object was to establish reasonable rates, rules and regulations. The cause was heard on bill and answers; and the Association declared unlawful.

In an opinion by Mr. Justice Peckham this court held that the Sherman Act applies to railroad companies; that it prohibits all contracts, combinations and conspiracies in whatever form which directly restrain interstate or international commerce; and that its operation cannot be limited to those which according to the doctrines of the common law "unreasonably" restrain the same.

The question as to intent was disposed of thus—

> (341) Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants; and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the Government is not necessary

to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

[An unlawful intent in entering into the agreement was immaterial because the agreement in fact and by its terms restrained trade. U. S. *v.* Joint Traffic Association, 171 U. S., 505, 561, 563.]

Touching the class of contracts which may in some way affect commerce, the opinion contains this language—

> (329) A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question. But we cannot see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the lawmaking body that enacted it.

In reply to the contention that railroads should be exempt from the anti-trust law because of peculiar evils arising from unrestrained competition amongst them, this language is used—

> (322) Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce, which when carried out affect the interests of the public. * * * It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity and have been induced by motives of individual or corporate aggrandizement as against

the public interest. In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital.

* * * * * * *

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lower. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their fami-

lies from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common.

United States v. *Joint Traffic Association* (1898), 171 U. S., 505—

Thirty-one railroad companies engaged in transportation east of Chicago formed an association "to aid in fulfilling the purpose of the Interstate Commerce Act,

to co-operate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules, and regulations on state and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." The bill prayed that the agreement be declared illegal and its further execution be enjoined. The cause was heard on bill and answers. The lower court dismissed the bill; on appeal here that action was reversed.

In an opinion by Mr. Justice Peckham, the doctrines announced in the Trans-Missouri Freight Association case were reaffirmed. The court considered and denied the contention that a citizen is deprived of his liberty without due process of law when prohibited by general statute from making a contract the direct effect of which is to restrain interstate commerce and declared that "where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered." "The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce."

Replying to suggestions by counsel, the Court further said—

> (567) We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of

> a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business. * * * To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court.

Hopkins v. *United States* (1898), 171 U. S., 578—

A proceeding under the Sherman Act to dissolve the Kansas City Live Stock Exchange—a voluntary association of commission merchants—and to perpetually enjoin the members from entering into or continuing in any combination of like character.

In an opinion by Mr. Justice Peckham this court held the arrangements complained of were not in their direct effect in restraint of trade or commerce among the several States, and that the record did not show defendants had monopolized or attempted to monopolize any part of such commerce. Among other things he said—

> (592) The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce

which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. * * *

To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely although certainly. *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1.

* * * * * * *

(594) An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct.

* * * * * * *

(600) The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it. We have no

idea that the act covers or was intended to cover such kinds of agreements.

Anderson v. *United States* (1898), 171 U. S., 604—

Proceeding against purchasers of cattle who were members of the Traders' Live Stock Exchange alleged to be an unlawful combination in restraint of trade. This Court, speaking through Mr. Justice Peckham, denied the Government's contention and held the arrangement evidenced by the by-laws "not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act." He further said—

> (615, 616) It has already been stated in the Hopkins case, above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or com-

merce is in any event but indirect and incidental, and not its purpose or object. As is said in Smith *v.* Alabama, 124 U. S. 465, 473: "There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations." The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void. We think, within the plain and obvious construction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid.

Addyston Pipe and Steel Company v. *United States* (1899), 175 U. S., 211—

Six corporations engaged in the manufacture, sale and transportation of iron pipe, with places of business in different States, became members of an association

which in fact destroyed competition amongst them; they claimed, however, that it was not intended to raise prices beyond what was reasonable but only to prevent ruinous competition. The bill asked that the association be declared unlawful and was sustained by the Circuit Court of Appeals for the Sixth Circuit in an elaborate opinion by Taft, Judge (85 Fed., 271) where the pertinent authorities are collected and discussed. Upon appeal the decree was affirmed, this court being of opinion that the direct and immediate result of the combination was necessarily a restraint upon interstate commerce.

It was urged (among other things) that the power of Congress "does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce." Speaking by Mr. Justice Peckham this court said—

> (228) Under this grant of power to Congress [the commerce clause], that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitu-

tional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty, or property without due process of law. It has been held that the word "liberty," as used in the Constitution, was not to be confined to the mere liberty of persons, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. Allgeyer *v.* Louisiana, 165 U. S. 578; United States *v.* Joint Traffic Association, 171 U. S. 505, 572. But it has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we

think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States.

* * * * * * *

(229) If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate, interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them? The private contracts may in truth be as far reaching in their effect upon interstate commerce as would the legislation of a single State of the same character.

* * * * * * *

(230) Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is State legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.

* * * * * * *

(231) It is, indeed, urged that to include private contracts of this description within the grant of this power to Congress is to take from the States their own power over the subject, and to interfere with the liberty of the individual in a

manner and to an extent never contemplated by the framers of the Constitution, and not fairly justified by any language used in that instrument. If Congress has not the power to legislate upon the subject of contracts of the kind mentioned, because the constitutional provision as to the liberty of the citizen limits, to that extent, its power to regulate interstate commerce, then it would seem to follow that the several States have that power, although such contracts relate to interstate commerce, and, more or less, regulate it. If neither Congress nor the State legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, State or National, which can legislate upon the subject of or prohibit such contracts. This cannot be the case.

If it should be held that Congress has no power and the State legislatures have full and complete authority to thus far regulate interstate commerce by means of their control over private contracts between individuals or corporations, then the legislation of the different States might and probably would differ in regard to the matter, according to what each State might regard as its own particular interest. One State might condemn all kinds of contracts of the class described, while another might permit the making of all of them, while still another might permit some and prohibit others, and thus great confusion would ensue, and it would be difficult in many cases to know just what law was applicable to any particular contract regarding and regulating interstate commerce. At the same time contracts might be made between individu-

als or corporations of such extent and magnitude as to seriously affect commerce among the States. These consequences would seemingly necessarily follow if it were decided that the State legislatures had control over the subject to the extent mentioned.

* * * * * * *

(234) If the necessary, direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and, that regulation existing, it is unimportant that it was not designed.

Where the contract affects interstate commerce only incidentally, and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce, is of no importance. We conclude that the plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent

> of that power, as claimed by the appellants. We therefore think the appellants have failed in their contention upon this branch of the subject.

Replying to the contention that the combination in question did not directly restrain or regulate commerce among the States within the principles announced in the E. C. Knight Case, he further said—

> (240) It was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made.
>
> * * * * * * *
>
> (241) If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute.

Montague & Company v. *Lowry* (1903), 193 U. S., 38—

A private action for damages under section 7 of the Sherman Act against members of the Tile, Mantel and Grate Association of California, composed of wholesale dealers in that State and manufacturers located in

others. The by-laws forbade purchasing from any manufacturer not a member of the association and from selling, except at exorbitant prices, to non-members. Judgment below for plaintiffs was affirmed.

Mr. Justice Peckham, speaking for the Court, among other things, said—

> (45) The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tile by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tile ceases to be a mere transaction in the State of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.
>
> * * * * * * *
>
> (47) The purchase and sale of tile between the manufacturers in one State and dealers therein in California was interstate commerce within the Addyston Pipe Case, 175 U. S. 211. It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, which was an article of commerce between the States. United States *v.* E. C. Knight Company, 156 U. S. 1, did not, therefore, cover it. It is not brought within either Hopkins *v.* United States, 171 U. S. 578, or Anderson *v.* United States, 171 U. S. 604. * * * Upon examination we think it is entirely clear that the facts in the

case at bar bear no resemblance to the facts set forth in either of the above cases and are not within the reasoning of either. The agreement directly affected and restrained interstate commerce.

Northern Securities Company v. *United States* (1904), 193 U. S. 197—

In pursuance of preliminary agreements amongst stockholders of the Great Northern and Northern Pacific Railroad companies, the Northern Securities Company was organized in New Jersey as a holding company with $400,000,000 authorized capital and wide powers. By fully executed transfers and conveyances, partly in exchange for its own shares and partly for cash, it became the absolute owner of the majority shares in both railroads. The Government filed a bill against the corporations, certain individual officers and directors, alleging the arrangement was in violation of the Sherman Act. This court approved an adjudication "that the defendants above named [all of them] have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' denounces as illegal;" enjoined the Northern Securities Company from voting the stocks acquired or undertaking to control the companies issuing the same; and prohibited the railroad companies from permitting such control or voting of stock and from paying dividends to the holding company.

Mr. Justice Harlan, speaking for the court, among other things, said—

> (331, 332) That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*
>
> That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy, or monopoly upon such trade or commerce;
>
> That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;
>
> That combinations, even among *private* manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act;
>
> That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;
>
> That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce,* and which would *in that way*

restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce;

That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

Replying to the suggestion that an order by a Federal court preventing the Northern Securities Company from exercising the power to hold stocks granted by its charter would invade rights of the State, Justice Harlan further said—

> (345) No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and

across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. * * * The Federal Court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that Company and prevent it from doing that which, if done, will defeat the act of Congress. * * * In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce.

A minority of the Court dissented upon grounds elaborated in separate opinions by Mr. Justice White and Mr. Justice Holmes.

I—Mr. Justice White said in effect— The mere acquisition and ownership by a holding company of stock in railroad corporations created by a State is not interstate commerce, although the railroads are engaged therein. Consequently, the authority of Congress delegated by the commerce clause does not embrace the power to regulate such acquisition and ownership. The power to limit the quantity and character of property which may be *acquired and owned* by a corporation belongs exclusively to the States—Congress can only control the *use*. The distinction is between the right to *"acquire and own"* and the right *"to do"* after acquisition. In the Knight case, "as the contract merely concerned the purchase of stock in the refineries and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause the fact that ownership of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership."

The defendants' business is a part of interstate and foreign commerce; the acquired businesses of competing concerns were parts thereof; the contracts, arrangements and plan all directly relate thereto; the use of property acquired and the result of things which de-

fendants are doing every day directly concern and affect the movement of commodities in such commerce; there is here no mere question of ownership. In Loewe *v.* Lawlor (208 U. S., 274) a combination among individuals not themselves engaged in interstate commerce *to do* things constituting no part of such commerce, but which directly restrained it, was declared unlawful in a unanimous opinion.

II—Mr. Justice Holmes said—

> (404) Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business (although, in some cases, carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was, primarily, on the contractor's own account. * * * Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.
>
> Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized, or at-

tempted to monopolize, some portion of the trade or commerce of the realm.

The minority were of opinion that merely uniting the interests of stockholders in the railroads through the Northern Securities Company, under the circumstances shown, was not within these definitions.

In the present case there are many contracts to refrain from competition which affected the contractor's own business, and repeated instances of efforts to drive out and deter competitors by unfair trade methods, and otherwise. The necessary tendency of defendants' operations is to monopoly, destruction of opportunity for strangers either to continue or enter in interstate or foreign commerce in tobacco and related commodities; and there is actual monopoly.

Harriman v. *Northern Securities Company* (1905), 197 U. S., 244—

This grew out of the Northern Securities case and was instituted upon the theory that absolute title to the railroad shares never passed to the Securities Company but the latter took as trustee for transferors and not in its own right. This court held the conveyances were completely executed and the Securities Company acquired absolute title. The decree in the Northern Securities case undertook to destroy the effect of these completely executed conveyances by preventing the use of property actually sold, transferred and delivered.

Swift & Company v. *United States* (1905), 196 U. S., 375—

A proceeding against corporations, firms and individuals in different States. The bill alleged that they

were engaged in interstate commerce in the purchase, sale, transportation and delivery, and subsequent resale at the point of delivery, of cattle and fresh meats; that they combined to refrain from bidding against each other and to maintain uniform sale prices at which meat should be sold and uniform charges for deliveries; and that in these ways and others they restrained commerce in fresh meats from the purchase and shipment of the live stock to the final delivery to consumers. Upon appeal, this Court sustained a decree overruling the demurrer and approved the injunction (with some modifications) against all the parties (individuals included).

Mr. Justice Holmes, speaking for the Court, said—

> (398) It is said that this charge is too vague and that it does not set forth a case of commerce among the States. Taking up the latter objection first, commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. * * *
>
> (395) The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts

alleged are, and from their nature must be, so extensive in time and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties.

* * * * * * *

(396) The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens* v. *Wisconsin,* 195 U. S., 194, 206 * * * The unity of the plan embraces all the parts.

* * * * * * *

(397) Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State, is an object of attack. See *Leloup* v. *Port of Mobile,* 127 U. S., 640, 647; *Crutcher* v. *Kentucky,* 141 U. S., 47, 59; *Allen* v. *Pullman Co.,* 191 U. S., 171, 179, 180. Moreover, it is a direct object; it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not

like *United States* v. *E. C. Knight Co.*, 156 U. S., 1, where the subject matter of the combination was manufacture, and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject matter is sales, and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales.

Cincinnati et al., Packet Co. v. *Bay* (1906), 200 U. S., 179—

A suit on contract which defendants unsuccessfully urged was illegal because in violation of the Sherman Act. Speaking for the Court, Mr. Justice Holmes, among other things, said—

(184) We will suppose, then, that the contract does not leave commerce among the States untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. * * * The chief and visible object of its provisions has nothing to do with commerce among the States. That which suspends payment of instalments in case of very serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

* * * * * * *

> (185) This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from any one, we believe that such a contract, made as part of the sale of a business, and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute.

Loewe v. *Lawlor* (1908), 208 U. S., 274—

This was heard upon demurrer to a declaration of parties who manufactured hats in Connecticut, and then sold and distributed them throughout many States, against members of the United Hatters of North America. It charged that defendants and other members of the association had combined for the purpose of forcing the plaintiffs against their will to employ them and that to bring this about they had by means of boycotts and otherwise interfered with operatives, intimidated customers, and prevented sale of manufactured goods. The defendants claimed the declaration stated no cause of action within the Sherman Act because the alleged restraint would operate entirely to destroy plaintiff's business and thereby include intrastate trade as well as interstate commerce; that physical obstruction was not alleged; and that they were not themselves engaged in interstate commerce.

The Chief Justice, speaking for the Court, declared

the allegations of the petition sufficient. He reviewed former opinions and among other things said—

> (292) In our opinion, the combination described in the declaration is a combination "in restraint of trade or commerce among the several States," in the sense in which those words are used in the act, and the action can be maintained accordingly.
>
> (293) And that conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business.
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> * * * * * * *
>
> (300) The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other States, and that, for the direct purpose of destroying such interstate traffic, defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connecticut to the various places of destination. * * * If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and, at the other

end, after the physical transportation ended, was immaterial.

Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that "every" contract, combination, or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed, so that the act remained as we have it before us.

See also—*National Cotton Oil Co.* v. *Texas,* 197 U. S., 115; *Shawnee Compress Co.* v. *Anderson,* 209 U. S., 423; *Continental Wall Paper Co.* v. *Voight,* 212 U. S., 227.

V.

Monopoly is the outcome of the practical cessation of effective business competition. This word in the Anti-Trust Act has no reference to a grant of special privileges but is used in a broad sense. Trade and commerce in any commodity are monopolized whenever as the result of the concentration of competing businesses—not occurring as an incident to the orderly growth and development of one of them—one or a few corporations (or persons) acting in concert practically acquire power to control prices and smother competition.

To "monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade," etc., is declared unlawful by Section 2 of the Sherman Act.

The rights of an individual acting alone are not

involved in the present controversy, and it seems unnecessary to inquire concerning limitations on his liberty of action.

Manifestly the word "monopolize" has no reference to a governmental grant of exclusive privilege. Congress was striking at an existing evil—unification of control with consequent destruction of competition through powerful organizations—and the whole Act must be construed and applied in view of its fundamental purpose as revealed by the history of the times and otherwise.

The exact boundaries of monopoly are not easily fixed; and, as with fraud, a hard-and-fast definition is undesirable. A description of what comes clearly within the term is all the above proposition attempts. Generally, the essential thing is ability to control prices or deprive the public of advantages flowing from free competition. Whether this power has been actually exercised or prices increased or diminished is immaterial. And possession of requisite ability must be determined by practical consideration of existing conditions, giving due weight to peculiarities of the commerce involved.

According to the letter of the statute, when commerce has been actually monopolized criminality does not depend on mental state of the parties, their primary or main intent or purpose, or methods used. How far these must be considered in peculiar cases—especially those involving the orderly expansion of strictly legitimate enterprises—we need not stop to consider; this record presents no such condition. Certain it is that

where parties have deliberately pursued a course, the ordinary result or necessary tendency of which is monopoly, they cannot be heard to deny such an intent; and the plan is sufficient to give unlawful character to all their acts. (*U. S.* v. *Trans-Mo. Ft. Assn.; Addyston Pipe Co.* v. *United States; Swift & Co.* v. *U. S.*) Certainly, also, a monopoly is unlawful if acquired through contract, combination or conspiracy which directly and essentially destroys competition. And the monopolies and attempts to monopolize complained of and established are all within these plain principles.

The Courts have long referred to "monopoly," the outcome of individual action as distinguished from governmental grant, without exact definition; and they have habitually declared unlawful every arrangement directly leading to "monopoly." The word in the Sherman Act has the same significance as in the well known, often reviewed opinions, from Mitchell *v.* Reynolds, 1 P. Williams, 181, to Continental Wall Paper Co. *v.* Voight, 212 U. S., 227. In *U. S.* v. *Addyston Pipe Co.*, 85 Fed., 271, these are collected, classified and discussed.

E. C. Knight Co. v. *United States,* 156 U. S., 1, 16—

> Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.

In *People* v. *North River Sugar Refining Co.*, 54 Hun, 354, BARRETT, *J.*, speaking of the results of combinations under consideration, said—

> (377) Of course a monopoly in the strict, technical and absolute sense cannot be thus created, but a monopoly in the legal sense can. The monopoly with which the law deals is not limited to the strict equivalent of royal grants or peoples' patents. Any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus at will enhance prices to the detriment of the public, is a legal monopoly.

See also *American Biscuit Co.* v. *Klotz*, 44 Fed., 721-724.

Pearsall v. *Great Northern Railway* (Mch., 1896), 161 U. S., 644—

It was proposed to turn over to the Great Northern Railway one-half of the stock of the Northern Pacific Road under an agreement between the two companies. This was successfully attacked because in violation of the Statute of Minnesota prohibiting a railroad from acquiring control of a competing line. This Court, speaking by Mr. Justice BROWN, said—

> (671) With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured.
>
> * * * * * * *
>
> (677) The consolidation of these two great corporations will unavoidably result in giving

> to the defendant a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all trans-continental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition.

National Cotton Oil Co. v. *Texas* (Feb., 1905), 197 U. S., 115—

The decree of the Texas Court, declaring unlawful the action of cotton oil companies engaged in an effort to acquire a monopoly in commerce within that State, was upheld. Mr. Justice McKENNA for the Court, said—

> (129) It is certainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil. The foundations of the belief we are not called upon to discuss, nor does our purpose require us to distinguish between the kinds of combinations or the degrees of monopoly. It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a "condition produced by the acts of mere individuals." Its dominant thought now is, to quote another, "the notion of exclusiveness or unity;" in other words, the suppression of competition by the unification of interest or management, or it may be through

agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other States and in a well-known national enactment. According to them, competition, not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interests, and the power such unification gives.

Shawnee Compress Co. v. *Anderson,*
209 U. S., 423, 433—

A suit was brought in Oklahoma Territory by stockholders of Shawnee Company to cancel a lease of its property to the Gulf Compress Company. They alleged that the latter was in the business of leasing and operating competing compresses for the purpose of monopolizing as far as possible the business of compressing cotton in a large portion, if not all, the cotton raising districts and that the lease in question was procured in pursuance of that scheme. The Supreme Court of the territory declared: "Not only is the enterprise in which the Gulf Compress Company is engaged an unlawful one as now conducted, but the contract in question in this case being made to further its

objects and purposes is void on the ground that it is in unreasonable restraint of trade and against public policy." And it accordingly sustained the bill. Upon appeal here the judgment was affirmed, and this Court, by Mr. Justice McKenna, said—

> (433) It may be conceded that the evidence shows that the Shawnee Company was financially embarrassed, and its condition might have justified a lease of its property if that had been all it did. It, however, covenanted for its assistance in discouraging competition against its tenant, and bound itself not to "directly or indirectly engage in the compressing of cotton within 50 miles of any plant operated by the tenant." So far it covenanted to aid in the restraint of trade. It went out of the field of competition; it covenanted not to enter into that field again, and it pledged itself to render every assistance to prevent others from entering it. And it could not misunderstand the purpose for which its lease was solicited. It was told by the President of the Gulf Compress Company. In a letter dated April 18, 1905, addressed to it by the president of that Company, among other inducements, the following was expressed: "Our getting together on a lease proposed means the avoiding for each other, directly or indirectly, of the possibility, if not probability, of unnecessary competition." And what was the condition to which the Shawnee Company contributed? It appears from the letter just mentioned that the writer was president of two companies, which operated "forty odd compresses."

Twenty-seven of them, it appears from the testimony, were operated by the Gulf Company, six only of which it owned. Most of the latter were acquired in the summer preceding the lease, and the president of the Gulf Company testified that, "We are prepared to buy or lease, whichever proposition suits us best." To what object was the assembling in one ownership or management so many compresses, and keeping the means and declaring the purpose of acquiring more? The answer would seem to be obvious. The first effect would necessarily be the cessation of competition. If there was left a possibility of other compresses being constructed, it was made less by the power that could be opposed to them. The Gulf Company was a close corporation, which, starting in Alabama, rapidly extended from Alabama to all the cotton-growing territory. These are some of the points of the testimony which, taken in connection with other testimony, and with the terms of the lease and the restriction upon the Shawnee Company, support the conclusions of the Supreme Court of the Territory. This case presents something more than the lease of property by the Shawnee Company, induced or made necessary by financial embarrassment. It presents something more than the acquisition by the Gulf Company of another compress,—of a mere addition to its business. It presents acts in aid of a scheme of monopoly. *Swift & Co.* v. *United States,* 196 U. S., 375.

See also—*U. S.* v. *Freight Ass'n,* 166 U. S. 290, 323; *Continental Wall Paper Co.* v. *Voight,* 212 U. S.,

227; *American Biscuit Co.* v. *Klotz,* 44 Fed., 725; *Rubordsan* v. *Buhl,* 77 Mich., 632; *Pocahontas Coke Co.* v. *Powhatan C. & C. Co.,* 60 W. Va., 508; *Harding* v. *American Glucose Co.,* 182 Ill., 619-620; *Noyes on Intercorp. Rels.,* Secs. 329 *et seq.,* 389; *Andrews Amer. Law* (2d Ed.), Vol. I, 773.

VI.

The legislation against combinations and monopolies cannot be defeated by causing a corporation to acquire the shares or the property and business of competing corporations; nor by any other scheme or device.

Congress has declared that interstate and foreign commerce shall not be materially obstructed by combinations or monopolies and has provided a remedy where one of these exists. The language of the statute includes all—whatever their form—which produce the mischief.

The earliest combinations destructive of competition were simple agreements among separate concerns. They were uniformly held in violation of public policy and consequently illegal. Seeking to avoid this result the well known trust form was adopted. It likewise failed because in conflict with public policy and also the rules of corporation law. Lastly, the corporate form was hit upon; and it has been stoutly maintained that competition can be destroyed effectively and with impunity by causing a corporation to acquire the controlling shares or the business and property of competitors.

It may be that the corporate combination meets the

requirements of corporation law; but manifestly it occasions worse results to the public than either of the others. It conflicts with public policy and consequently is illegal. (*Eddy on Combinations,* Vol. I, Secs. 617-620 *et seq.; Noyes on Intercorporate Relations,* Sec. 307; *Distillery Co.* v. *People,* 156 Ill., 448.)

If A, B and C, competitors, controlling the greater part of interstate commerce in a given commodity, enter into a thirty-day agreement by which they obligate themselves not to compete and assign to each certain territory, they unquestionably violate the law. But with strange regard for form and neglect of substance it often has been insisted that these same persons with the same design may organize a corporation, divide the shares amongst them, become its officers, create a practical monopoly by conveying to it, with covenants against competition, their several businesses to be thereafter conducted in unison, and in this way with certainty and impunity bring about the very situation which the Sherman Act was intended to prevent. The result indicates the groundlessness of the insistence.

If a corporate combination is beyond its reach, then Congress lacks supreme power to regulate commerce and its will is easily defeated. There is nothing peculiarly sacred about a corporation. It is a mere creature of State law which certainly cannot bestow power to defeat constitutional enactments not possessed by the State itself. (*Northern Securities Case,* 193 U. S., 197; *Deb's Case,* 158 U. S., 564.)

The right to buy and sell is not superior to the right

to make other contracts. All are subordinate to the power of Congress to regulate commerce and any contract—however innocent if standing alone—may be criminal when part of a scheme to bring about unlawful ends. (*Addyston Pipe Co.* v. *U. S.*, 175 U. S., 211; *Northern Securities Co.* v. *U. S.*, 193 U. S., 197; *Swift & Co.* v. *U. S.*, 196 U. S., 396; *Shawnee Compress Co.* v. *Anderson*, 209 U. S., 423; *Armour Packing Co.* v. *U. S.*, 209 U. S., 56; *United States* v. *Del. & Hud. R. R.* (*Commodities Clause Case*), 213 U. S., 366; *Nat'l Harrow Co.* v. *Hench*, 83 Fed., 36; 84 Fed., 226.)

The right freely to buy, sell and transfer property is not a fundamental civil right to be exercised without limitation as interested parties may determine. It is subordinate to public policy and the lawfully expressed will of Congress.

A corporation which—not as an incident to orderly growth—secures control of competitors by purchasing their shares or property and business and thereby acquires power to suppress competition is no less inimical to public interests than a technical "Trust," and indeed is often a mere modification of the latter (*Distilling Co.* v. *People*, 156 Ill., 448-491). The direct, necessary result of such an arrangement is to hinder and obstruct commerce. The Pearsall Case, 161 U. S., 644; Northern Securities Case, 193 U. S., 344; and Shawnee Compress Case, 209 U. S., 423, seem conclusive on this point. *In Re* Green, 52 Fed., 104, and the E. C. Knight

Case, if to the contrary, must be considered as disapproved.

The claim that the Act of 1890 was directed against contracts and combinations of an executory nature only, and was not intended to apply where transfers were actually executed before being attacked, is without foundation. It prohibits obstructions to commerce whether resulting from executory or executed arrangements; the effect on commerce is the important consideration. (*Northern Securities Case,* 193 U. S., 197; *Shawnee Compress Co.* v. *Anderson,* 209 U. S., 423; *People* v. *Chicago Gas Trust,* 130 Ill., 268; *Distillers & Cattle Feeding Co.* v. *The People,* 156 Ill., 448; *Pocahontas Coke Co.* v. *Powhatan Coal & Coke Co.,* 60 W. Va., 508.)

This general subject is vigorously discussed in *Eddy on Combinations,* Secs. 617, 620 *et seq.,* and in *Noyes on Intercorporate Relations,* Secs. 306, 319, 354; and the authorities are there collated and analyzed.

Eddy on Combinations, Sec. 622—

> That which individuals cannot lawfully do by simple combinations they cannot lawfully do by corporate combinations. This proposition seems too clear to require illustration, and yet the impression prevails very generally that by simply changing the form of the combination the decisions against simple combinations and trusts have been entirely evaded. In so far as the decisions against trusts were based upon the general principles governing corporations, the

adoption of the corporate form of combination undoubtedly meets many of the objections urged against the trust form; but in so far as the decisions against trusts and simple combinations challenged the validity of combinations generally, the adoption of the corporate form is no evasion whatsoever. The right of any number of individuals to form a corporation and sell to the corporation, in return for either cash or the capital stock of the corporation, their plants and properties, has nothing to do with the question whether or not the object of these individuals in forming the combination and in so disposing of their plants and properties is to do that which is unlawful or oppressive.

Noyes on Intercorporate Relations, Sec. 354—

The test of the legality of a combination lies in its object and not in its form. The view that a combination by means of a purchasing corporation is less vulnerable than other forms of combination is well founded only with reference to questions of corporation law. * * * That which public policy forbids in the case of an association or trust cannot lawfully be done by a corporate combination, and *vice versa.* * * * If the sale is for the purpose of forming a corporate combination, in which the vendor corporation participates, the same rule of public policy is applicable as in the case of any combination of corporations. As already stated, the object of a combination, or the necessary or natural consequence of its operation, determines its legality. The form—trust, corporate com-

bination or association—will not serve as a cloak for conspiracy nor prevent the application of the rule of public policy.

Corporate power to purchase no more authorizes the exercise of such power for purposes opposed to public policy, than a general power to make contracts authorizes the execution of agreements conflicting with the public interests.

See also Id. Secs. 386 *et seq.* on interpretation of Sherman Act.

VII.

A foreign corporation doing business within the United States has no right to violate their policy or laws. An agreement or combination which in purpose or effect conflicts therewith, although actually made in a foreign country where not unlawful, gives no immunity to parties acting here in pursuance of it.

The contracts between the Imperial and the American companies, under which they organized the British-American Company and apportioned the world, were executed in England, and defendants claim were lawful there. All the parties operate here in pursuance of them.

The doctrine stated above seems obvious. If the Government is powerless to prevent wrongs within its own jurisdiction, when the actors are foreigners, or when done in pursuance of agreements made abroad, then its supposed sovereignty is a myth.

Section 8 of the Sherman Act in specific terms makes it applicable to "corporations and associations

existing under or authorized by * * * the laws of any foreign country."

There is no proper evidence in the record to prove the law of England. "Foreign laws are well understood to be facts which must like other facts be proved to exist before they can be received in a court of justice." (*Church* v. *Hubert*, 2 Cranch, 187-237; *Armstrong* v. *Lear*, 8 Peters, 52, 72; *Lloyd* v. *Matthews*, 155 U. S., 222; *Cuba R. Co.* v. *Crosby*, 170 Fed. 369.)

The rule that the courts of one country cannot take cognizance of the law of another, without plea and proof, has been constantly maintained at law and in equity in England and America (*Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S., 397, 445).

Wharton on Criminal Law—

> (Sec. 278) Cases can easily be conceived in which a person, whose residence is outside a territory, may make himself, by conspiring extra-territorially to defeat its laws, intra-territorially responsible. If a forger, for instance, should establish on the Mexican side of the boundary between the United States and Mexico a manufactory for the forgery of United States securities, for us to hold that when the mischief is done he would not be liable to arrest on extradition process, and that he could afterwards take up with impunity his residence in the United States, would not merely expose us to spoliation, but bring our Government into contempt.
>
> (Sec. 279) A party who in one jurisdiction

puts in operation a force which does harm in another jurisdiction, is responsible in both jurisdictions for the harm.

(Sec. 287) In conspiracies, by the common law, each conspirator is responsible in any place where any overt act by any of his co-conspirators is done, as well in the place where the crime is concocted and started.

A crime is committed within the jurisdiction where the act of the parties actually takes effect, although the instrumentalities may have been set in motion within another jurisdiction. (*Re Palliser,* 136 U. S., 256, 265; *Horner* v. *United States,* 143 U. S., 207; *Benson* v. *Henkel,* 198 U. S., 1; *Burton* v. *United States,* 202 U. S., 344, 387; *United States* v. *Thayer,* 209 U. S., 39, 44.)

Contracts permissible by other countries are not enforcible in our courts if they contravene our laws, our morality or our policy. (*Oscanyan* v. *Winchester, &c., Co.,* 103 U. S., 261; *Kennett* v. *Chambers,* 14 How., 38; *Walworth* v. *Harris,* 129 U. S., 355; *Pollock on Contracts,* side pgs., 387, 388; *Page on Contracts,* Vol. III, Sec. 1729; *Westlake on Private International Law,* 3rd Ed., 259, 260.)

Generally speaking, the validity of a contract depends upon the law of the place where it is made unless it is to be performed in another country; in the latter case, the law of the place of performance governs. (Story on Conflict of Laws, Secs. 242, 244.)

The rule of comity does not require any nation to

allow a foreign corporation to engage in business within its jurisdiction in a manner violative of express statute or contrary to its policy. (*Bank of Augusta* v. *Earle,* 13 Pet., 519, 589; *London, Paris & Amer. Bank* v. *Aronstein,* 117 Fed., 601; *Williams* v. *Gold Hill Min. Co.,* 96 Fed., 464).

A foreign corporation doing business in this country is amenable to our laws and it cannot escape the consequences of an illegal act by setting up a foreign charter. (*Orient Ins. Co.* v. *Daggs,* 172 U. S., 557; *Hammond Packing Co.* v. *Arkansas,* 212 U. S., 322; *Horn Silver Min. Co.* v. *N. Y.,* 143 U. S., 305; *Lafayette Ins. Co.* v. *French,* 18 How., 404; *State* v. *Phipps,* 50 Kan., 609; *Harding* v. *Am. Glucose Co.,* 182 Ill., 551; *Dayton, &c., Co.* v. *Barton,* 103 Tenn., 604; *State* v. *Stand. Oil Co.,* 61 Neb., 28; *People* v. *Cent. R.R. of N. J.,* 48 Barb., 478; *Warren Mfg. Co.* v. *Aetna Ins. Co.,* 2 Paine, 501.) (See also *Waters-Pierce Oil Co. v. Texas,* 177 U. S., 28; *State, ex rel, Astor* v. *Schlitz Brewing Co.,* 104 Tenn., 715.)

It is wholly immaterial that a combination affecting our commerce was formed in a foreign country if operations under it are conducted here. (*Thomsen* v. *Union Castle Mail Steamship Co.,* 166 Fed., 253.)

American Banana Co. v. *United Fruit Co.,* 213 U. S., is in no way inconsistent with this insistence.

VIII.

The courts should enforce the Anti-Trust Legislation by all appropriate processes known to their usages; and decrees should be so moulded as to suppress effectually the mischief consequent upon unlawful arrangements.

In *Northern Securities Company* v. *United States*, 193 U. S., 197, this Court said—

> (346) In short, the Court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States.
>
> * * * * * * *
>
> (360) This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act" (Section 4); and the Court, in virtue of a well established rule governing proceedings in equity, may mould its decree so as to accomplish practical results,—such results as law and justice demand.

By Constitutional enactment Congress has forbidden monopolies and combinations. When one exists everything done to further its purpose is unlawful, especially every act constituting a part of interstate or foreign commerce. Therefore the privilege of engaging therein may be denied. The power to regulate extends to prohibition of anything directly conflicting with the will of Congress lawfully expressed. (*Champion* v. *Ames* (*Lottery Case*), 188 U. S., 321; *United States* v. *D. & H. Co.*, 213 U. S., 366; *Loewe* v. *Lawlor*, 208 U. S., 274.)

The statute requires the Court "to prevent and restrain violations"—not merely to pass upon the legality of past transactions. After the purposes of a combination or attempt to monopolize have become effective it would be idle ceremony merely to inveigh against the means by which the end was accomplished or to enjoin the use of methods successful in the past but no longer necessary.

The public interest demands destruction of existing mischief and prevention of threatened wrong. This cannot be accomplished by simply enjoining methods which have brought about an unlawful status. The courts should destroy the foundation of the existing unlawful power.

It has been contended that the Sherman Act strikes executory contracts but has no application to those actually executed. In other words, to attempt is penal; but success gives complete immunity! Counsel below argued that while attempts to monopolize might be prohibited an *existing* accomplished monopoly is not within the statute; "That Congress did not intend to prohibit a state of being, but it intended to prohibit certain activities the tendency of which is to exclude others from the trade!" If one's house were being looted he would find small comfort in an injunction (however fierce its terms) which merely restrained the robbers from thereafter using the ladder which let them in. Direct, vigorous blows against vital points are imperative when dealing with powerful, determined lawbreakers.

In simple combinations where the identity of each party has been preserved a decree forbidding action in pursuance of the unlawful project may suffice. When there is a trust or a holding corporation a decree forbidding the exercise of dominion over the stock may suffice. Where the combination is in the corporate form and the identity of original elements (independent businesses) has been destroyed, each having been swallowed up, and also where one corporation has acquired a monopoly by a series of combinations or purchases or otherwise, more difficult problems are presented. It is nevertheless the court's duty to prevent public injury and wrongdoers may not complain if an illegal structure is wholly annihilated. The public welfare is the prime consideration.

We submit that where an unlawful corporate combination exists and identity of constituents has been destroyed, or where one corporation has acquired a forbidden monopoly, there are two possible effective remedies. The first is to enjoin the corporation from doing interstate or foreign business until (if ever) it can affirmatively show that its affairs have been readjusted so as to render future operations lawful. The second is a receiver to take possession of the concern and by proper action restore the opportunities for free competition unlawfully smothered or destroyed. How this can be done will, of course, depend on the special facts of each case. Whenever the first remedy suggested would unreasonably inconvenience the public by immediately de-

stroying sources of supply, the second may be adopted. The purpose of removing any obstruction to commerce is to benefit the public, and that should always be a prime consideration.

In Deb's Case, 158 U. S., 564, without mandate of statute the Court granted a sweeping injunction against a mob interfering with the free flow of commerce. May not the Court, obeying a positive command to "restrain and prevent" combinations and monopolies, issue an injunction forbidding any combination or monopoly to further operate in interstate or foreign commerce; or, for the especial protection of public interests, appoint receivers and require them to take steps necessary to restore conditions harmonizing with the statute?

A court of equity has full power to shape its decrees so as to enforce the law (Taylor *v.* Simon, 4 Mylne & Craig, 141; Pomeroy on Eq. Juris., 2d Ed., Secs. 111-170.)

In Chicago, Rock Island, &c., Ry. *v.* Union Pacific Ry., 47 Fed., 15-26, Mr. Justice Brewer, then Circuit Judge, replying to an argument that there was no precedent for the decree prayed, said—

> I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand. * * * the powers and processes of a court of equity are equal to any and every emergency.

> They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature, and do justice to every individual.

In Stockton, Atty-Gen. *v.* Central R.R. Co., 50 N. J. Eq., 52, 489, the State sought to prevent a combination to control the market and enhance the price of anthracite coal, and the Chancery Court granted an injunction. Subsequently, the Attorney-General (50 N. J. Eq., 489) reported that the decree was ineffectual and was being disobeyed; and he asked "that a receiver be appointed to take charge of the road of the Central Railroad Company of New Jersey generally, or with such powers in relation to the transportation of coal thereover as may be necessary to enforce obedience to the commands of such order and injunction." Concerning the proposed receivership, the Court said—

> (499) I have not for a moment doubted the power of this court, where it is necessary to prevent the property of the defendant from use in the contrivance of devices to mislead and deceive the court and thereby defeat its injunction, to take control of that property through the instrumentality of a receiver. Indeed, the power of the court to appoint such a receiver, when the appointment is necessary to effectuate its decree, has not been disputed. Such power is

so essential at times to the efficient exercise of the court's jurisdiction that it has become too well established either to be seriously questioned or to need citation of authority to support it. Out of consideration for property rights it is sparingly and cautiously exercised, but when execution of a decree depends upon its exercise the court will most certainly use it to the full extent that the exigencies of the case demands.

IX.

Summary of the Petition—History and Facts not in Controversy.

The story of The American Tobacco Company, and its allied corporations, is long and complicated. The petition, based chiefly upon information obtained from defendants, was intended to set out pertinent facts with sufficient completeness for pleading; and also for a fair understanding of existing conditions, how they were brought about, and the purpose of the parties. Answers in general terms and lengthy written admissions were put in. Improper methods, evil intent and unlawful restraint or monopoly are all stoutly denied; but in general there is no material controversy over the statements in the petition concerning former trade methods, the origin, development and extension of The American Tobacco Company and its allies, their relations and contracts with each other, and the amount and character of their business.

In order, therefore, to point out the essential facts as briefly as clearness will permit there follows a full outline of the petition's contents, to which are added in

their proper connection some undisputed things (with citations to record), usually indicated by brackets. This will be succeeded by statements of points in the answers and concerning evidence relating especially to contraverted subjects.

THE DEFENDANTS AND GENERAL ALLEGATIONS.

Defendants are sixty-five corporations—most of New Jersey, two of Great Britain—and twenty-nine officers, directors and agents. [For corporate relationship see Gov. Ex. 87, R. V.] The principal ones are The American Tobacco Company, capital $118,931,500; Imperial Tobacco Company of Great Britain and Ireland, capital 18,000,000 pounds sterling; Havana Tobacco Company, capital $35,000,000; American Snuff Company, capital $25,000,000; American Cigar Company, capital $20,000,000; American Stogie Company, capital $11,855,000; MacAndrews & Forbes Company, capital $7,000,000, and United Cigar Stores Company, capital $1,650,000. All are charged with being parties to contracts, agreements, combinations and conspiracies in restraint of interstate and foreign commerce in tobacco leaf and products and related articles, and with monopolizing and attempting to monopolize the same.

DESCRIPTION OF TOBACCO BUSINESS (Par. II, R. I, 12.)

The chief use of leaf tobacco is for making cigars, cigarettes, snuff and preparations for smoking or chewing (plug). The average annual crop in the United States amounts to about 800,000,000 pounds, is com-

posed of distinct types—with sundry grades—which grow in widely separated sections; and each is essential for some special product or brand—no other can be substituted. The types, with the States where grown, their approximate amounts, proportions purchased by defendants (from 20 to 90 per cent.) and also the quantity exported (300,000,000 pounds annually) with its ultimate destination are stated (R. I, 13-14)—[See evidence defendants' purchasing agent Yuille, R. II, 95-99].

Before 1890, along customary lines, many separate independent concerns grew up and were successfully engaged in buying, manufacturing, selling and distributing tobacco in various States and abroad. They purchased leaf where it grew, caused its transportation to their plants, manufactured the products and then sold, shipped and distributed these throughout this country and others. All as active competitors were engaged in interstate and foreign commerce and each sought to extend its trade in the ordinary ways. Many buyers representing independent dealers, speculators, warehousmen and manufacturers, located in various States, sought to purchase leaf directly from the farmer or at central markets; and effective competition determined prices. Related articles were likewise manufactured, bought and sold (R. I, 15-16). [See evidence of Kinney, R. II, 530; Yuille, R. II, 89; R. K. Smith, R. II, 156; Cobb, R. III, 8.]

Within recent years it became customary to pack tobacco products in small parcels ready for the con-

sumer, marked with distinctive names or brands, and to advertise and otherwise popularize them. [For such advertisements see Exs. 68 & 69, R. V, 507.] As a result, the business became largely a "matter of brands" and the leading ones highly important to jobbers and retailers.

Commerce in tobacco leaf and products grew along the lines indicated and but for the unlawful action of defendants would have so continued.

ORGANIZATION OF THE AMERICAN TOBACCO COMPANY—CIGARETTE MONOPOLY (Par. III, R. I, 16).

Before January, 1890, five distinct concerns—Allen & Ginter, W. Duke, Sons & Co., Kinney Tobacco Company, W. S. Kimball & Company, Goodwin & Company—located in North Carolina, Virginia and New York—manufactured, sold and distributed here and abroad 95 per cent. of all domestic cigarettes, and a considerable quantity of smoking tobacco [Ex. 9, R. V, 32]. They were independent and in unrestrained effective competition as purchasers of leaf and as manufacturers, sellers, shippers and distributers of tobacco products. Their owners, believing this would yield larger profits, determined to combine through a corporation and use it to destroy competition and monopolize commerce in cigarettes. In January, 1890, having agreed upon a capital stock of $25,000,000 (afterwards $35,000,000 and $70,000,000), all to be divided amongst them [for details see Ex. 8, R. V, 3-4], and who should be directors, they organized The American

Tobacco Company in New Jersey [Charter, R. V, 34], "for trading and manufacturing," with broad powers, and conveyed to it at greatly inflated valuations the assets and businesses, including good-will and right to use the names of the old concerns; and thereafter this corporation carried on the business of all, competition amongst them was destroyed and commerce in cigarettes monopolized. [The fair value of the tangible assets of all five was $3,545,108.02, according to report of Bureau of Corporations to the Senate, June 5, 1909.]

The American Tobacco Company was originally and with added acquisitions has continued to be a combination in restraint of interstate and foreign commerce and has always had a monopoly. In 1890 it required under 15,000,000 pounds of leaf and manufactured 5,526,000 pounds of smoking products and 2,410,520,000 cigarettes—the latter being 96 per cent. of the total domestic output [Ex. 8, R. V, 4].

DEFENDANTS' PURPOSE AND GENERAL METHODS (Par. IV, R. I, 19).

About 1891, and subsequently, The American Tobacco Company, its officers, directors and others, entered into and have remained parties to contracts, combinations and conspiracies in restraint of interstate and international commerce in tobacco and related commodities, and ever since have monopolized and attempted to monopolize the same. These have been continuously acted upon with the purpose and effect of destroying competition, unreasonably hindering and obstructing

commerce, and causing others to retire therefrom or not to enter. The American Tobacco Company has been the principal instrument for carrying out the defendants' purpose, but they have from time to time adopted any expedient means. Among other things they have done and are doing those hereafter specifically detailed.

With expanding purpose to dominate the industry, defendants have progressively absorbed competitors or driven them out by oppressively attacking and threatening to attack with ferocious opposition and unfair trade methods; and by the exercise of their great power have deterred and prevented others from engaging in the business.

Through offers of large sums of money, accompanied by threats of irresistible competition, they have compelled other concerns to sell out, taking from their directors and stockholders agreements against competition; by agreements and combinations with others, managers, etc., and by issuing in exchange stock or otherwise, they have acquired dominion over competitors; they have caused the organization of corporations with wide powers, which they control, and through these acquired the business of others; and by unlawful contracts with opponents they have apportioned the trade and commerce in tobacco throughout the world. They have concealed their relationship with controlled companies and used them, acting under the guise of independents, to break down opposition; they have acquired monopolies of articles necessary in manufacturing tobacco products, such as licorice, tin-foil, etc.; they have

practiced unfair trade methods, sold their goods below cost, manipulated the markets, and otherwise exercised their great power to gain control and destroy opponents; and they have obtained dominion over the agencies through which tobacco and its products are bought and sold, through outright ownership, by advancing large sums of money, giving unusual credits, by threats to withdraw their goods or patronage, etc.

EXPANSION OF BUSINESS AND ACQUISITION OF COMPETITORS BY THE AMERICAN TOBACCO COMPANY (Pars. V, VI, R. I, 22-29).

(After the foregoing recitals the petition proceeds to set forth with particularity how the general purpose has been carried out and results accomplished.)

From 1891 to 1898 The American Tobacco Company acquired (frequently by issuing stock) property, plants, business, good-will, etc., of many important competing concerns (they are enumerated R. I, 22-29) located in different States and engaged in commerce as purchasers, manufacturers, sellers and distributers of tobacco leaf and its products, taking from the owners, stockholders and others stipulations not to engage in such business for periods varying from ten to twenty years (See Ex. 31, R. V, 114). These plants were sometimes run as branches, but generally closed. During the year 1891 the manufactured output of the company was [cigarettes and little cigars (No.) 2,798,-946,500; smoking (lbs.) 10,371,877; fine cut (lbs.) 262,114; snuff (lbs.) 311,750; plug (lbs.) 4,342,790; Exs. 77, 78, 79, 80, 82, R. V].

CONTINENTAL TOBACCO COMPANY—PLUG COMBINATION (Par. VII, R. I, 29-34).

When The American Tobacco Company entered the plug trade it came into active competition with other powerful concerns likewise engaged; and in 1893 it endeavored to bring about a combination. [See Ex. 39, R. V, 192.] This failed and a fierce commercial warfare followed, continuing until 1898 with heavy loss to the company. [In 1895—$892,687; 1896—$1,378,345; 1897—$889,730; 1898—$926,302—See Rept. Bureau of Corporations on Prices of Tobacco, June 5, 1909, p. 35. For details concerning growth of this business see Ex. 79, R. V; and for action of directors concerning losses see Ex. 39, R. V, 192, 193.]

In 1898, after continued negotiations, The American Tobacco Company and certain leading plug competitors agreed to unite through the Continental Tobacco Company to be organized in New Jersey for "trading and manufacturing," with capital of $75,000,000 (afterwards $100,000,000), which should apportion its stock amongst them and take over the business and property of all (R. I, 29-34)—[Charter Ex. 12, R. V, 39]. Immediately after organization this company issued stock, as agreed, and took transfers of plants, assets and business of five large and successful competing plug manufacturers (R. I, 32); the American Company also conveyed at greatly inflated valuations, the assets, brands, real estate and good-will appertaining to its plug business; and the principal owners and man-

agers of the old concerns agreed not thereafter to engage in the business. Likewise, under the preliminary arrangement, the Continental Company acquired the common stock of P. Lorillard Company, a large producer of tobacco products, taking similar covenants (R. I, 32). The American Company became owner of $30,000,000 stock in the Continental and remained the dominant stockholder; James B. Duke was president of both, and their affairs were conducted in concert. Having acquired these plants, assets and competing businesses the Continental Company conducted them all and competition was destroyed.

The separate organization of P. Lorillard Company has been preserved—many individuals holding its preferred stock—but it has been controlled by the Continental or American and all competition prevented (R. I, 32, 33).

ACQUISITION OF SUNDRY COMPETITORS BY AMERICAN AND CONTINENTAL COMPANIES IN 1899, AND SUBSEQUENTLY (Pars. VIII and IX, R. I, 34-47).

In 1899, and thereafter, The American and Continental companies for cash or stock, at an aggregate cost exceeding $50,000,000, took over and closed up some thirty competing corporations and partnerships (specified in Petition, Par. VIII, R. I, 34-38) theretofore engaged in interstate and foreign commerce as manufacturers, sellers and distributors of tobacco and related commodities, the interested parties covenanting not to engage in the business; and in this way destroyed competition and increased their power.

Likewise they acquired for cash, by issuing stock, and otherwise, control of many competing corporations now going (specified in Petition, Par. IX, R. I, 39-47), with plants in various States, Cuba and Porto Rico, which manufacture, buy, sell and distribute tobacco products or related articles throughout the United States and abroad as a part of commerce; and took from the parties in interest the usual covenants. [For examples of methods see Exs. 32 and 33, R. V, 132 *et seq.*] These have been operated in pursuance of the general plan and have acquired subsidiaries. Some of those so acquired (others are described later) are the following—

MONOPOL TOBACCO WORKS (NEW YORK, N. Y.)—Capital $40,000—cigarettes and smoking tobacco. In 1899 The American Tobacco Company acquired all the shares for $250,000, and it is now a selling agency.

LURHMAN & WILBERN TOBACCO COMPANY (MIDDLETOWN, OHIO)—Capital $900,000—scrap tobacco. This business was formerly carried on by a partnership. For the purpose of taking it over in 1899, The American Company caused the Luhrman & Wilbern Tobacco Company to be incorporated in New Jersey [Ex. 32, R. V, 132.] The connection was long concealed and denied. [Its output for 1907 was 12,958,963 pounds of smoking tobacco.—Ex. 78, R. V.]

MENGEL BOX COMPANY (LOUISVILLE, KY.)—Capital $2,000,000—boxes for packing tobacco. In 1899, Continental Company acquired control of the partnership (C. C. Mengel, Jr., Bro. & Co.) and by

agreement organized in New Jersey the Mengel Box Company which took over the old business and assets. This Company has acquired the stock ($150,000) of Columbia Box Company and of Tyler Box Company ($25,000), both at St. Louis, and dominates the business.

The Porto Rican-American Tobacco Company (Porto Rico)—Capital $1,799,600. In 1899 The American Company caused the organization of the Porto Rican-American Tobacco Company, which took over the partnership business of Rucabado y Portela—manufacturer of cigars and cigarettes—with covenants not to compete. The American Tobacco Company and American Cigar Company each hold $585,300 of the stock; the balance is in the hands of individuals. [Ex. 8, R. V, 9]—[Its output for 1907 was 321,657,040 cigarettes; 54,327,144 cigars, and 13,775 pounds of plug; it dominates the tobacco business in that island.—Ex. 85, R. V.]

Kentucky Tobacco Product Company (Louisville, Ky.)—Capital $1,000,000. In 1899 the Continental Company acquired control of the Louisville Spirit-Cured Tobacco Company, engaged in curing and treating tobacco and utilizing the stems for fertilizers. By agreement, the Kentucky Tobacco Product Company was organized in New Jersey, with $1,000,000 capital, $450,000 issued to the old stockholders, and $550,000 to Continental Company as consideration for agreement to supply stems. The company has acquired a practical monopoly in this line.

GOLDEN BELT MANUFACTURING COMPANY (NORTH CAROLINA)—Capital $700,000—cotton bags and containers. In 1899 The American Tobacco Company acquired the business of this corporation, which was formed to take over a going business. It has contracts to supply members of the combination and is rapidly acquiring a monopoly.

THE CONLEY FOIL COMPANY (NEW YORK)—TIN-FOIL COMBINATION—Capital $825,000. In December, 1899 The American Tobacco Company secured control of the business of John Conley & Son (Partnership), New York, N. Y., manufacturers of tin-foil, an essential for packing tobacco products. By agreement, the Conley Foil Company was incorporated in New Jersey "for trading and manufacturing," etc., with $250,000 capital (afterwards $375,000 and $825,000)—[see Charter, Ex. 18, R. V, 69], which took over the firm's business and assets, etc., and The American Tobacco Company became owner of the majority shares. The Conley Foil Company has acquired all stock of Johnston Tin-foil & Metal Company, of St. Louis, a leading competitor, and they supply under fixed contracts, at remunerative prices, the tin-foil used by defendants [the major part of the total production in the United States], leaving the excess, whenever expedient, to be sold below cost to destroy competitors and strengthen its monopoly.

R. J. REYNOLDS TOBACCO COMPANY (WINSTON-SALEM, NORTH CAROLINA)—Capital $7,525,000. In 1899 the Continental Tobacco Company acquired control of the R. J. Reynolds Tobacco Company, one of

the largest manufacturers of plug—output in 1898 6,000,000 pounds. By agreement, a new corporation (with same name) was organized in New Jersey and capitalized at $5,000,000 (afterwards $7,525,000), which took over the business and assets of the old one. [See Charter, Ex. 19, R. V, 72.] The Continental Company immediately acquired the majority shares and The American Company now holds $5,000,000 of stock. The separate organization has been preserved, but its business conducted without competition. In 1906 it purchased 27,500,000 pounds of leaf. [In 1907 its output was 1,255,988 pounds of smoking tobacco and 21,616,781 pounds of plug—Exs. 78 & 79, R. V.] Acting under direction, the R. J. Reynolds Tobacco Company has purchased the business and assets and majority shares of other concerns (specified in Pet., R. I, 44), with covenants against competition.

BLACKWELL'S DURHAM TOBACCO COMPANY (DURHAM, N. C.)—Capital $1,000,000. In 1899 The American Tobacco Company procured for $4,000,000 all the stock of Blackwell's Durham Tobacco Company at Durham, N. C., manufacturer and distributer of tobacco products. Thereupon the Blackwell's Durham Tobacco Company, of New Jersey, capital $1,000,000, all owned by The American, was organized and took over the assets of the old company, then under receivership. Its separate organization has been preserved. [In 1907 its output was 15,365,184 pounds of smoking tobacco—Ex. 78, R. V.]

Acting under direction, the Durham Company has acquired control of the following competitors—Rey-

nolds Tobacco Company; F. R. Penn Tobacco Company [Exs. 37 & 38, R. V, 182, 186]; and Wells-Whitehead Tobacco Company.

AMERICAN SNUFF COMPANY—SNUFF COMBINATION (Par. X, R. I, 47).

Prior to 1900, the Continental Tobacco Company, The American Tobacco Company, and P. Lorillard Company manufactured, sold and distributed snuff throughout the various States—their combined output in 1899 approximating 5,000,000 pounds (R. I, 47). Between these and the Atlantic Snuff Company, itself a combination of competitors—producing 5,000,000 pounds annually—the George W. Helme Company, Weyman & Brother, and others, there was sharp competition. To destroy this and obtain monopoly defendants in March, 1900, organized in New Jersey the American Snuff Company, capital $25,000,000, to take over the plants, business, assets, etc., of the competitors. [See Charter, Ex. 16, R. V, 57.] This company by issuing stock acquired the business and assets of Atlantic Snuff Company and the snuff business of P. Lorillard Company, Continental Tobacco Company, George W. Helme Company and The American Tobacco Company, taking the usual covenants not to compete, and thereafter conducted the business of all. [See Preliminary Agreement, Ex. 34, R. V, 148.]

Pursuing the general plan the Snuff Company has acquired control of plants, business and assets of all important competitors (Specified in Pet., R. I, 47-57) either by outright purchase or through stock owner-

ship—with the usual covenants—and controls more than ninety-five per cent. of the business. It has often used unfair and oppressive methods [see Ex. 41, R. V, 307], and has secretly operated the Standard Snuff Company, of Nashville, Tennessee.

The American and Continental companies have always controlled the Snuff Company; their affairs have been conducted in concert; enormous profits have accrued; and interstate commerce in snuff has been monopolized. [The output of defendant for 1907 was 22,067,234 pounds—total for United States 22,960,038—See Ex. 82, R. V.]

SUNDRY GOING COMPANIES CONTROLLED BY THE AMERICAN TOBACCO COMPANY THROUGH STOCK OWNERSHIP—UNITED CIGAR STORES COMPANY—THE LICORICE COMBINATION (MAC ANDREWS & FORBES)—RICHARDSON & COMPANY—AMSTERDAM SUPPLY COMPANY, ETC. (Par. XI, R. I, 57-74.)

S. ANARGYROS—Capital $650,000—Turkish cigarettes. In 1890 The American Tobacco Company procured the organization of corporation S. Anargyros, which took over that individual's going business and has since controlled it. [Through this company the business in Turkish cigarettes is largely conducted. In 1907 its output was 554,492,480—Ex. 77, R. V.]

THE JOHN BOLLMAN COMPANY (SAN FRANCISCO)—Capital $200,000—cigarettes. In 1900 The American Tobacco Company procured organization of The John Bollman Company, which took over the business of the former concern in exchange for stock. Its separate organization has been preserved but no competi-

tion exists. [Its output for 1907 was 43,688,300 cigarettes—Ex. 77, R. V.]

UNITED CIGAR STORES COMPANY—RETAIL BRANCH OF COMBINATION. In November, 1901, The American Tobacco Company acquired stock control of and has since directed and financed the United Cigar Stores Company (of New Jersey), organized in May, 1901, [original paid up capital $2,500] to sell and distribute tobacco products throughout the United States, especially at retail. The stock was rapidly increased. The American Tobacco Company now holds $600,000 of the $900,000 common, all preferred—$750,000, and $2,850,000 bonds. The United Company has acquired the business of many retailers and procured and forced their retirement. It buys tobacco products and supplies of all kinds in the different States, ships them to its depots in New York City, Chicago and San Francisco and then distributes them among its various stores. It operates retail cigar stores in New Jersey, New York, Pennsylvania, Ohio, Maryland, District of Columbia, Connecticut, California, Washington, Delaware, Oregon, Texas, Massachusetts, Rhode Island, Illinois, Minnesota, Michigan, Indiana, Missouri, Wisconsin, Kentucky and other States. It promotes and furthers the sale of defendants' products and hinders and obstructs the sale of independent goods, either refusing to handle them or accord fair treatment. For a long time the association with defendants was concealed and denied. It has been and is used as an instrument to control the retail business and cripple competitors; it has bought out dealers, taking the usual cove-

nants from the vendors. It has likewise at tremendous cost set up retail stores at prominent places in various cities and with the powerful support of defendants is seeking to dominate the retail trade. Through stock ownership it controls the following companies engaged in the tobacco trade (R. I, 59-60)—United Cigar Stores Company, Chicago, Ill., capital $389,800; United Cigar Stores Company, Providence, R. I., capital $98,000; The Royal Company, New York City, capital $100,000; C. A. Whelan & Co., Inc., Syracuse, N. Y., capital $50,000; United Cigar Stores Company, agency, New York, capital $1,000; United Merchants Realty and Improvement Company, of Rhode Island, capital $500,000; Moebs Cigar Stores Company, Detroit, Mich., capital $10,000; Wm. Baeder & Company, New York, capital $25,000.

F. F. Adams Tobacco Company (Milwaukee, Wis.)—Capital $400,000—Manufacturers and distributers of tobacco. In 1902 the Continental Company acquired for $2,205,090 the entire capital, with the usual covenants. Its separate organization has been preserved, but under agreement no competition exists. [In 1907 its output was 4,794,129 pounds of smoking tobacco and 168,433 of "fine cut"—Exs. 78 and 80, R. V.]

Spaulding & Merrick (Chicago, Ill.)—Capital $100,000—Manufacturers and distributers of tobacco. In 1902 the Continental Company for $1,362,900 acquired control, and thereupon organized a new corporation with the same name in New Jersey which

took over the business and assets of the going concern, with the usual covenants. [Its output for 1907 was 7,396,153 pounds of smoking tobacco and 5,455,260 of "fine cut." Exs. 78 and 80, R. V.]

MacAndrews & Forbes Company—Licorice Combination—Capital $7,000,000. Licorice paste, an essential in plug tobacco, is made from an Oriental root. Prior to 1902 many competing concerns imported this root, manufactured products therefrom and sold and distributed them in the usual ways. The principal ones were MacAndrews & Forbes, Newark, N. J.; The Mellor & Rittenhouse Company (controlled by Continental Company), Camden, N. J.; J. S. Young Company, Baltimore, Md.; Stamford Manufacturing Company, Stamford, Conn.; and John D. Lewis, Providence, R. I. Smaller manufacturers were Young & Smylie, F. B. & V. P. Scudder, and Weaver & Sterry, Limited, New York City.

In May, 1902, the Continental Company secured control of MacAndrews & Forbes and contracted with The Mellor & Rittenhouse Company and MacAndrews & Forbes [See Ex. 23, R. V, 81] that a new corporation called MacAndrews & Forbes Company should be organized in New Jersey and acquire the business of the latter two. Accordingly, the new MacAndrews & Forbes Company, capital $7,000,000—$4,000,000 preferred, without voting power, and $3,000,000 common—was incorporated "for trading and manufacturing," etc., [See Charter, Ex. 17, R. V, 63] and Continental Company acquired more than two-thirds of the common stock by simply agreeing to purchase its supply

of paste from the new company at 7 1-2 cents per pound. The American Tobacco Company now holds $2,112,900 of the common stock and $750,000 preferred.

In June, 1902, MacAndrews & Forbes purchased the business of Stamford Manufacturing Company, taking the usual covenants, and also incorporated the National Licorice Company (since in agreement) which acquired the business of Young & Smylie and F. B. & V. P. Scudder, taking the usual covenants. The National Licorice Company then agreed with MacAndrews & Forbes not to produce licorice for tobacco manufacturers.

During the Summer of 1902 the only formidable competitiors were the Young Company and John D. Lewis, and to drive these out of business the MacAndrews & Forbes Company sold licorice far below cost. Thereafter they all agreed not to compete and to maintain arbitrary prices [See Exs. 25, 26, 27 and 28, R. V, 95 *et seq.*] ; and an apportionment of business was made. Lewis' output was limited to 1,000,000 and Young's to 5,000,000 pounds and certain manufacturers were allotted to each as customers.

In 1903, by agreement between the Young Company and MacAndrews & Forbes Company (See Ex. 24, R. V, 89), J. S. Young Company, a new corporation with $800,000 capital, was organized, which took over the former's business. MacAndrews & Forbes Company received the majority shares of the common stock (which alone had voting power) for guaranteeing the annual sale of 5,000,000 pounds of paste. The

association was for a long time concealed and denied. [See R. III, 343.]

In 1906 an indictment under the Sherman Act was found against MacAndrews & Forbes Company and J. S. Young Company, and conviction followed. The former, after the indictment, acquired all stock and then took a conveyance of plant and business of the latter company and now carries on the same. It has secured complete control of and has monopolized the importation of licorice root and the manufacture, sale and distribution of its products. Of the 35,000,000 (40,000,000) pounds annually consumed in United States, MacAndrews & Forbes manufacture exceeding 95 per cent., and their importations of raw material is a larger percentage of the whole. It has agreements to supply all defendants at remunerative prices which enables it when expedient to sell any excess below cost to destroy competition. [See Ex. 8, R. V. 19; Ans. A. T. Co. R. I, 227-231.]

The Manhattan Briar Pipe Company (Marion, N. J.)—Capital $350,000. In 1902 The American Tobacco Company acquired at a cost of $468,534 control of Brunswick Briar Pipe Company, manufacturer of pipes, cigar and cigarette holders, and organized The Manhattan Briar Pipe Company in New Jersey, all of whose stock it owns, and this took over the business of the old concern. It subsequently acquired the stock of the Baltimore Briar Pipe Company and now carries on an extensive business as maker and distributor of pipes, etc.

R. A. PATTERSON TOBACCO COMPANY (RICHMOND, VA.)—Capital $150,000—smoking tobacco. During 1903, and subsequently, the Continental Company for $926,250 acquired all the stock, taking the usual covenants [See Ex. 36, R. V, 172]. This company has concealed and denied association with defendants, advertised itself as independent (See Ex. 64, R. V, 500), and practiced many unfair trade methods. [In 1907 its output was 5,145,528 pounds of smoking tobacco and 2,277,162 of plug—Exs. 78 and 79, R. V.]

R. P. RICHARDSON, JR. & COMPANY, INC. (REIDSVILLE, N. C.)—Capital $300,000—smoking tobacco. In 1903 The American Tobacco Company acquired a majority of the shares, taking covenants not to compete or engage in the business. A separate organization has been preserved. Its output for 1906 was about 1,000,000 pounds. [The original owners of this business are in litigation with the Trust seeking to avoid its control and assented to the decree below.]

THOMAS CUSACK COMPANY (CHICAGO)—Capital $250,000. In 1903 the American Tobacco Company by agreement with Thomas Cusack, of Chicago, engaged in sign and advertisement painting, organized in New Jersey the Thomas Cusack Company, capital $250,000 ($100,000 preferred, $150,000 common, the latter alone having voting power), which was issued to Cusack and he in turn assigned $100,000 common stock to The American Company for no other consideration than its co-operation in organizing the new company. [This company has an enormous sign painting business.]

PINKERTON TOBACCO COMPANY (ZANESVILLE, OHIO)—Capital $100,000—scrap tobacco. In 1903 Continental Tobacco Company acquired two-thirds of the capital stock, with the usual covenants. This connection was persistently concealed and denied and the company used to destroy others. [Its output for 1907 was 4,324,131 pounds of smoking tobacco.—Ex. 78, R. V.]

AMSTERDAM SUPPLY COMPANY—Capital $225,000 —Organized in 1903 by American Tobacco Company for purchasing all kinds of supplies (except leaf tobacco) for defendants, who in order to avoid buying in open market appointed it their general agent with power to determine prices. [Its annual purchases exceed $25,000,000. Certain defendants are stockholders and obligated to purchase through this company—R. III, 282.]

JOHN W. CARROLL TOBACCO COMPANY—Capital $425,000—manufacturers and distributers of tobacco. In 1905 The American Company acquired control of Carroll Brothers, Lynchburg, Va., and with the partners organized in New Jersey the John W. Carroll Tobacco Company, which took over the old business, with covenants against competition and the plant was closed.

NALL & WILLIAMS TOBACCO COMPANY (LOUISVILLE, KY.)—Capital $116,800—manufacturer and distributer of tobacco products. In 1905 defendants purchased all the stock for $438,000 cash. Its separate organization has been preserved, but its asso-

ciation with defendants was concealed and denied and the Company used to cripple opponents and destroy competition. [In 1907 its output was 3,489,052 pounds of plug and 174,362 of smoking tobacco—Exs. 78 and 79, R. V.]

NASHVILLE TOBACCO WORKS (TENN.)—Capital $120,000—plug tobacco. In 1906 The American Tobacco Company for $247,780 acquired the stock, with the usual covenants. This company acquired the business and assets of Britain Tobacco Works, at Columbia, Tenn., and closed the plant. [Its output for 1907 was 670,461 pounds of plug and 56,731 of smoking tobacco—Exs. 78 and 79, R. V.]

DAY & NIGHT TOBACCO COMPANY—Capital $400,000. In 1906 The American Company acquired control of the old Day & Night Tobacco Company, Duwel Brothers Tobacco Company, August Schroer Tobacco Company, and Queen City Tobacco Company, all of Cincinnati, manufacturers of scrap tobacco. It thereupon organized in Ohio the Day & Night Tobacco Company (capital $400,000) and caused it to take over the business of the four companies. The American Company (for $400,000 cash) at once acquired and now holds all the shares. The relationship was long denied and the company used to cripple opponents and destroy competition by unfair and oppressive trade methods. [In 1907, its output was 2,726,643 pounds of smoking tobacco—Ex. 78, R. V.]

Other concerns now in operation and under control of The American Tobacco Company and its subsid-

iaries follow—American Machine & Foundry Company—Capital $100,000—manufacturer of machinery; International Cigar Machinery Company—Capital $10,000,000—manufacturer of cigar machines; New Jersey Machine Company—Capital $100,000—manufacturer of machinery; Garson Vending Machine Company—Capital $50,000—engaged in exploitation of patents for vending cigars; Crescent Cigar & Tobacco Company—Capital $20,000—tobacco jobber.

The American Tobacco Company also owns $900,000 stock of Acker, Merrall & Condit Company, largely engaged in the grocery and cigar business; and $1,684,500 of capital stock of Standard Tobacco Stemmer Company, engaged in exploiting patents for stemming leaf tobacco.

AMERICAN CIGAR COMPANY—CIGAR COMBINATION—
(Par. XII, R. I, 74.)

Prior to 1901, the American and Continental tobacco companies manufactured, sold and distributed cigars, stogies and cheroots. They then determined to enter that business upon a larger scale and through a combination destroy competition and acquire a monopoly. Under agreement [See Ex. 35, R. V, 165] with Powell, Smith & Company, large manufacturers and dealers in cigars, they caused the incorporation in New Jersey of the American Cigar Company "for trading and manufacturing," etc. [See Charter, Ex. 15, R. V, 52], to which all three conveyed their said business, and it has since carried on the same. The American and Continental companies each acquired 46 1-2 per cent. of the shares, and Powell, Smith & Company 7 per cent.;

the original capitalization was $10,000,000 (afterwards $20,000,000), and more than three-fourths is owned by the former.

The Cigar Company pursuing the general plan acquired many competitors (partnerships and corporations) engaged in interstate and foreign commerce, taking from the parties the usual covenants (Specified in Petition, R. I, 76-79); and it has also procured the organization of controlled corporations which have acquired competing manufacturers, jobbers and distributors in the United States, Cuba and Porto Rico. It manufactures, sells and distributes a large percentage of domestic cigars; is the dominating factor in the tobacco business, foreign and domestic, in Cuba and Porto Rico, and is there engaged in tobacco planting. [See Evidence Cobb, R. III, 24, 25, 26, 27, 79, &c.] It has an organized department for the purchase of cigar leaf, with agents in all important markets and factories in various States and abroad; and it sells, ships and distributes the output to all States. It is one of the instrumentalities by which under the general plan competition is destroyed, interstate and foreign commerce restrained, and complete monopoly attempted.

Some corporations which the Cigar Company alone, or with other defendants, controls follow (R. I, 76-79)—

HAVANA TOBACCO COMPANY—Capital $34,500,000—a holding company with the majority stock of five corporations which manufacture cigars in Cuba and together produce and export the larger part of all ci-

gars exported from that island, viz.: Havana Commercial Company, capital $15,500,000; H. de Cabanas y Carbajal, capital $1,500,000; J. S. Murias & Company, capital $750,000; H. Clay & Bock Company, capital $1,600,000 (bonds $826,000); Havana Cigar and Tobacco Company, capital $2,527,000 (bonds, $1,262,600).

HAVANA-AMERICAN COMPANY—(Capital $250,000)—manufacturer and distributer of cigars; CORP. J. & B. MOOS—jobbers at Chicago, capital $150,000; FEDERAL CIGAR COMPANY—capital $200,000; CUBAN LAND & LEAF COMPANY—capital $100,000 [this Company owns plantations and raises tobacco in Cuba]; PORTO RICAN-AMERICAN TOBACCO COMPANY — Capital $1,999,000; PORTO RICAN LEAF TOBACCO COMPANY —Capital $500,000—engaged in tobacco planting, etc., in Porto Rico.

The Cigar Company also controls corporate jobbers in California, Alabama, Virginia, Pennsylvania, Georgia, Louisiana, New Jersey and Tennessee. [Its output for 1907 was 2,500,000 cigarettes and 854,061,931 cigars—Exs. 77 & 83, R. V.]

CONSOLIDATED TOBACCO COMPANY (Par. XIII, R. I, 81.)

In June, 1901 (about the time the Cigar Co. became very active and fight was on in England), pursuing the general scheme, parties largely interested in the American and Continental companies caused incorporation in New Jersey of Consolidated Tobacco Company, capital $30,000,000 (afterwards $40,000,000), with broad powers and perpetual existence; to do busi-

ness throughout the world, and to guarantee securities of other companies, etc. [See Charter, Ex. 13, R. V, 45. A majority of shares was taken by a few individuals connected with the old concerns: A. N. Brady, J. B. Duke, A. H. Payne, Thomas Ryan, W. C. Whitney and P. A. B. Widener—Ex. 49, R. V, 423.] J. B. Duke, president of both the old companies, became president of the Consolidated. Largely in exchange for bonds the new company acquired substantially all common shares of the old ones. Its business of holding and financing, with enormous profits, was continued until 1904 [Financial Statement, Ex. 52, R. V, 462-465], when with the American and Continental companies it was merged into The American Tobacco Company. (R. I, 92.)

THE AMERICAN STOGIE COMPANY. (Par. XIV, R. I, 82.)

In May, 1903, the American Cigar Company and The American and Continental tobacco companies caused the American Stogie Company to be incorporated in New Jersey, with $11,976,000 capital, which immediately took over their stogie and tobie business in exchange for $8,206,275 stock and then in the usual ways acquired the business of others in the manufacture, sale and distribution of such products, with covenants not to compete (R. I, 82-84). It acquired in exchange for $3,647,725 stock all shares of United States Cigar Company (which had previously acquired and owned the business of important competitors) and subsequently took a conveyance of the plant and assets. The majority shares always have been held by defendant the American Cigar Company. [Its output

for 1907 was 92,091,314 stogies, tobies, etc.—Ex. 83, R. V.]

ENGLISH COMPANIES AND AGREEMENTS. (Par. XV, R. I, 85.)

Formerly many separate competing concerns with plants located in Great Britain, directly or indirectly bought leaf tobacco in the United States and manufactured, sold and distributed the products in that country, the United States, and elsewhere. Many of these were old, well established, with large assets and world-wide reputations. [See Ans. A. T. Co., R. I, 245.]

Prior to 1901, The American Tobacco Company and subsidiaries determined to push vigorously the sale of their goods in the United Kingdom [See Ex. 39, R. V, 208], and for that purpose (September, 1901) purchased [for $5,347,000, Harris, R. II, 50] a Liverpool corporation—Ogden's, Limited—there engaged in manufacturing and distributing tobacco products. Through this, and otherwise, special efforts were made and a fierce trade conflict arose between them and the English manufacturers. Alarmed by the situation many of the latter with the major portion of the trade determined to combine [for combining companies, see Ex. 29, R. V, 106], and in 1901 they incorporated The Imperial Tobacco Company of Great Britain and Ireland, capital 15,000,000 (afterwards 18,000,000 pounds sterling), and in exchange for stock transferred to it their business and plants, which together with subsequent acquisitions it has since operated and conducted.

During 1901 and 1902 there was fierce commercial conflict between the two combinations. [The Imperial

offered large bonuses to dealers handling its goods exclusively, and its opponents agreed to distribute to British customers during four succeeding years all profits, and in addition 200,000 pounds sterling annually—See Ex. 39, R. V, 216.] Subsequently, defendants determined to end competition and parcel out the world, assigning exclusive fields for operation without competition.

Accordingly, in September, 1902, The Imperial Company, Ogden's, Limited, The American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, and parties in behalf of the British-American Company (Limited) entered into two written agreements (see Exs. 1 & 2, R. I, 111-133), stipulating among other things that The Imperial Company should limit its business to the United Kingdom and especially should retire from the United States, except to sell to other defendants and to buy and treat leaf tobacco for its own use; that it should take over the plant and business (except export) of Ogden's, Limited, in exchange for stock; that the American companies should limit their operations to the United States, its dependencies, and Cuba, and especially retire from the United Kingdom (except selling to the Imperial Company); that the British-American Company, Limited, should be incorporated under English law, with capital of 6,000,000 pounds sterling (apportioned one-third to The Imperial Company and two-thirds to the American companies), to do business throughout the rest of the world, to which the others, with stipulations against competition,

should convey their "export business" (meaning thereby the manufacture of tobacco to be used outside of the United Kingdom and the United States, and dealing in the same within such territory); that any of the parties might manufacture and within its territory deal in the brands and be the sole customer of all the others; that the directors of both combinations should enter into personal covenants against engaging in the business outside of their allotted territory; and that none should sell to any person when there was reason to believe he intended to export the article into the territory of another (see Exs. 1, 2, 3 & 4, R. I, 111-138). The agreements were immediately carried into effect and have been strictly observed by all the parties.

In exchange for Ogden's, Limited, a large amount of The Imperial Company's stock [for good-will and other intangible assets, 1,500,000 pounds—for tangible assets 1,217,000 pounds] was issued to The American Tobacco Company and the latter has since been allowed to select three directors. [At present they are James B. Duke, William R. Harris (defendants), and R. H. Walters.]

The Imperial Company was formed to associate in combination the great English manufacturers and has since controlled and monopolized the trade within the United Kingdom. Formerly it sold abroad large quantities of goods made from leaf grown in the United States and purchased in competition. Under the agreements of September 27, 1902, that business was abandoned. Necessary leaf tobacco is now purchased through many agents in this country under a resident

general agent and is exported as a part of foreign commerce. During the year 1906 these purchases aggregated 54,000,000 pounds, and as a result of the agreements aforesaid were made without competition with the other defendants.

The British-American Tobacco Company, Limited, was incorporated (September 27, 1902) under the laws of Great Britain with 6,000,000 pounds sterling capital, issued and now held one-third by The Imperial Company and two-thirds by The American Tobacco Company. The memorandum of association (R. I, 139-143) recites as one of its purposes—

> (139) To adopt, enter into, and carry into effect, with or without modification, an agreement proposed to be made between The Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the first part; Ogden's Limited, of the second part; The American Tobacco Company, of the third part; Continental Tobacco Company, of the fourth part; American Cigar Company, of the fifth part; Consolidated Tobacco Company, of the sixth part; and Williamson Whitehead Fuller and James Inskip, on behalf of a company intended to be formed under the Companies Acts, 1862 to 1900, with the name of British-American Tobacco Company, Limited, of the seventh part.

Having received, as agreed, from the other contracting companies conveyances of their "export business" and the property used in connection therewith, including the stock of many foreign corporations, the British-American Company entered upon and ever since

has been engaged in interstate and foreign commerce in leaf tobacco and in the manufacture and distribution of tobacco products throughout the world, but refrains from competition with any defendant. It was created for the special purpose of defeating and violating the laws of the United States; William R. Harris, Vice-President of The American Tobacco Company, is its principal officer, and maintains a branch office in New York City. This company uses large quantities of domestic leaf [during 1906, 47,737,293 pounds—Ex. 20, R. V, 76], partly exported to various plants abroad and about half manufactured here and then exported. By agreement, all this is purchased through The American Tobacco Company without competition with any other defendant. In addition to many plants abroad it has warehouses in various States and plants at Petersburg, Va., and Durham, N. C., where tobacco is manufactured and then exported. [In 1907 its manufactured output in the United States was—Cigarettes, 1,805,-1.7,150; Plug and Twist, 4,866,419 pounds—See Ex. 84 R. V.]

THE MERGED COMPANY OF 1904 (Par. XVI, R. I, 92).

By proceedings in New Jersey, October, 1904, The American Tobacco Company (old), Continental Tobacco Company and Consolidated Tobacco Company were merged into one under the name of The American Tobacco Company (Ex. 7, R. I, 150). The merged company, with perpetual existence, was capitalized at $180,000,000 ($80,000,000 preferred, ordinarily without power to vote) and empowered—

> To buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms; * * * to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder; * * * to carry on any business operations deemed by such merged corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property or stock; * * * to conduct business in all other States, territories, possessions and dependencies of the United States of America, and in all foreign countries; * * * to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock or of any bonds, securities, or other evidences of indebtedness created by any other corporation or corporations of this or any other State or government, and to issue its own obligations in payment or in exchange therefor. * * * (Ex. 7, R. I, 152.)

Prior to the merger, the Consolidated Tobacco Company, a majority of whose $40,000,000 share capital was held by J. B. Duke, Thomas F. Ryan, William C. Whitney, Anthony N. Brady, Peter A. B. Widener and Oliver H. Payne, had acquired nearly all common shares of both old American and Continental companies and thereby control; but the preferred shares were held by many individuals. Under the merger, shares held by one merging company in another were canceled, and in this way the old common stocks were retired,

except about $242,450. For preferred stock in the old American Tobacco Company six per cent. bonds of the merged company ($133 1-3 for each $100) were issued, and for Continental preferred stock, like bonds ($116 2-3 for each $100). Holders of four per cent. Consolidated Company bonds exchanged them for the merged company's preferred stock and four per cent. bonds in prescribed proportions; and the holders of Consolidated Company's stock and $242,450 common of the old companies received the total issued common stock of the merged one—$40,242,400. It resulted that the same six men in control of the combination through the Consolidated Tobacco Company continued it by ownership of stock in the merged or new American Tobacco Company. [See Ex. 7, R. I, 150; Ex. 8, R. V, 1; Ex. 14, R. V, 50; Ex. 47, R. V, 389, 390; Ex. 49, R. V, 423-426; Ex. 51a, R. V, 461.]

The assets, property, etc., of the old companies passed to The American Tobacco Company (merged) which has since carried on the business of all and now operates as branches, plants manufacturing cigarettes, little cigars and cheroots, plug and smoking tobacco, at Richmond, Danville, and Newport News, Va.; Baltimore, Md.; New Orleans, La.; New York City; St. Louis; Chicago; Durham, N. C.; Louisville, Ky.; Clarksville, Tenn.; Middletown, Ohio; Petersburg, Va.; and Owensboro, Ky. The products of these, with those of certain other defendants, are collected and then through the selling department, located in New York City, acting by agents, travelling and stationed, drummers, wholesalers, retailers, and others, in

the various States, are sold and shipped all as a part of interstate and foreign commerce. Hundreds of selling and distributing agencies throughout the various States are controlled and utilized.

Through an organized buying department, with special agents in all markets for itself and other defendants, especially P. Lorillard Company, Blackwell's Durham Tobacco Company, The John Bollman Company, Spaulding & Merrick, F. F. Adams Company, and S. Anargyros, the American Tobacco Company buys large quantities of leaf which is shipped from one State to another.

It has acquired many, and exercises dominion over other, jobbers, wholesalers, dealers, and distributors in the various States by loaning them large sums and giving unusual credit and secret rebates. In this and other ways dealers and distributers are forced to give preference to defendants' products and hinder competitors.

The American Tobacco Company, in its own name or through others, owns controlling interests in the stock of the other corporate defendants (except Imperial Tobacco Company) and dictates the election of their directors. All are engaged in interstate and foreign commerce in leaf tobacco, its products and related articles. By agreement they refrain from competition and co-operate to secure the retirement (except in association with them as employes or otherwise) of successful, capable persons engaged in the trade, to exclude others therefrom, to destroy competition and to monopolize the same.

PROFITS (Par. XVII, R. I, 93).

The profits accruing to the conspirators have been enormous. (See Appendixes "*N*" to "*Q*.")

In 1890 the share capital of The American Tobacco Company was $25,000,000—$10,000,000 preferred, $15,000,000 common—nominal assets balanced this. [The tangible assets as shown by the report of the Bureau of Corporations to the Senate, June 5, 1909, were $3,545.108.] The stock was increased to $35,000,000 and then $70,000,000 ($14,000,000 preferred). On preferred shares until the merger of 1904 eight per cent. annual dividends were paid; on the common from six to twenty-nine per centum. [In 1899, one hundred per cent. in stock and 6 per cent. cash—see Ex. 39, R. V, 201.] The ledger assets according to statement for 1903 were $86,000,000 (R. I, 99).

The outstanding stock of the Continental Company in 1899 was $48,844,600 preferred—$48,846,100 common (the Report of the Bureau of Corporations declared the common was water). Except in 1899 when the rate was three and one-half, seven per cent. per annum was paid on the preferred; on the common two per cent. in 1901, thirteen in 1902, and sixteen in 1903. Ledger assets at the end of 1903 were $120,000,000 (R. I, 97-99).

In 1901 the Consolidated Company was organized and acquired the common stock of The American and Continental companies, giving for each one hundred dollars of the former $200 four per cent. bonds and for the latter equal amounts of bonds. The stock of the Consolidated Company was originally $30,000,000

—afterwards $40,000,000. A dividend of twenty per cent. was paid during 1902. The net surplus from the 1903 earnings exceeded $10,000,000 and the annual statement showed total assets exceeding $214,000,000 (R. I, 99).

In 1904 the three old companies were merged; $133 1-3 six per cent. bonds were given for each $100 preferred stock of The American Tobacco Company and $116 2-3 for each $100 preferred stock of the Continental; and similar exchanges were made of other securities. The holders of the Consolidated Tobacco Company shares obtained the common stock of the merged company upon which since 1904 they have received dividends varying from twenty to thirty-two per cent. per annum. The total assets shown in 1906 statement exceed $278,000,000—accumulated surplus $30,000,000, and the net surplus from that year's earnings, after deducting dividends and expenses, exceeded $6,750,000 (R. I, 100-101).

RESULTS OF THE COMBINATION, ETC. (Par. XVIII, R. I, 102).

[Through stock ownership The American Tobacco Company controls all the defendant corporations except the Imperial Company. The admitted relationship is shown by Ex. 87, R. V, and all report directly or indirectly to American Tobacco Company.]

The Imperial Company, in which The American Company is a large stockholder (now 750,000 pounds), combined the most powerful English concerns, formerly competitors in foreign trade and commerce in American leaf tobacco and in manufacturing, selling

and distributing its products throughout the world, including the United States; it now controls and monopolizes such trade, manufacture, and commerce within its allotted territory—the United Kingdom—and observes the agreements of September 27, 1902 (Exs. 1 & 2, R. I, 111-133), which destroy competition. It purchases some American leaf from dealers in England, but secures its principal supply through a general agency in the United States, with sub-agents in States where desired types are sold. Through this, and as a part of interstate and foreign trade and commerce, more than 50,000,000 pounds of leaf are annually purchased and shipped to England without competition with the other defendants. While rivalry may exist among agents the extinction of genuine competition is the inevitable result of existing conditions.

The British-American Tobacco Company, whose stock is held one-third by The Imperial and two-thirds by The American Company, was created for effectuating the illegal arrangements of September, 1902; and has acquired many foreign concerns and monopolizes foreign trade and commerce in American tobacco. This company requires annually 50,000,000 pounds American leaf which The American Company purchases for it without competition with any other defendant. About one-half of this is exported; the remainder is converted into manufactured products in this country and sold abroad, being more than 90 per cent. of such trade.

Through The American Company and controlled companies by unlawful contracts, combinations and conspiracies defendants have acquired outright ownership

or control (with few exceptions) of the important domestic establishments formerly competitors in the manufacture of smoking tobacco, plug, snuff, cigarettes, little cigars, tin-foil, and licorice paste, and in interstate and foreign commerce in leaf tobacco and such products; by agreements they have obligated hundreds of successful men to refrain from trade and commerce therein, and have destroyed competition and acquired a monopoly; they have become so powerful that successful competition by a new concern would be practically impossible.

Through the American Cigar Company defendants have a dominating influence over and prevent competition and unlawfully restrain trade and commerce between the United States, Cuba, and Porto Rico, and among the several States, in cigars and leaf tobacco, and are attempting to monopolize the same.

Through American Snuff Company they monopolize interstate and foreign commerce in snuff; have destroyed competition and are unlawfully restraining interstate and foreign trade and commerce.

Through MacAndrews & Forbes Company they monopolize interstate and foreign trade and commerce in licorice root, licorice paste and other products; have destroyed competition and are unlawfully restraining commerce.

Through Conley Foil Company they monopolize interstate and foreign trade and commerce in tinfoil; have destroyed competition and are unlawfully restraining commerce.

[They are likewise engaged in many other branches

of trade through companies named in the petition; and all are used to acquire monopolies.]

The necessary leaf for all defendants is purchased under a common control by special agents abroad and in all important domestic districts, directly from the growers or at central markets in various States, and is then shipped to warehouses and factories in other States and abroad. Of domestic leaf, without competition among themselves, they annually acquire 20 per cent. of the cigar type and more than two-thirds of all others —of some more than 80 per cent. By reason of their power in combination they dominate the market and have a controlling influence upon prices. During the year ending September 1, 1906, they purchased approximately 475,000,000 pounds of domestic leaf; and during the following year their purchases were probably a larger proportion of the whole. [For details of defendants' purchases not including Imperial Co., See Ex. 76, R. V ; also *post*, p. 179.]

By agreements among them all supplies (except leaf) for defendants are purchased through the Amsterdam Supply Company, and thus competition has been destroyed.

The manufactured output of all is advertised, sold and distributed under a common oversight, through agents and dealers throughout the various States and abroad as a part of interstate and foreign commerce, and without competition. The larger part (except that of The Imperial Tobacco Company and British-American Tobacco Company) is advertised, sold and distributed through the sales department of The American

Tobacco Company, which fixes prices and determines everything in connection therewith.

Certain defendant companies, especially the American Snuff Company, American Cigar Company, R. J. Reynolds Tobacco Company, R. A. Patterson Tobacco Company, Standard Snuff Company, Pinkerton Tobacco Company, F. R. Penn Tobacco Company, Day & Night Tobacco Company, Wells-Whitehead Tobacco Company, Nall & Williams Tobacco Company, maintain separate purchasing and sales departments, with agents in many States, and through them and otherwise they buy leaf, sell and distribute their products; but all report, directly or indirectly, to The American Tobacco Company, which has ultimate control, decides how and where the others may operate, fixes prices and prevents competition.

[For officers and directors of the more important companies, see Exs. 42-46, R. V, 342-361.]

All business of defendants is conducted without real competition amongst them and as a part of a general plan, agreement, combination and conspiracy to destroy competition, drive out opponents and deter others from entering. They have already disposed of most opponents and have obtained such power that the remaining few conduct their business in the well-grounded fear of swift destruction whenever defendants decide to eliminate them. The mere withholding or withdrawal of their numerous brands from dealer, jobber or retailer would probably render his success impossible. [For list of leading brands see Exs. 62, 63, 64, R. V, 488-492.] The opportunities for new competitors are con-

stantly being closed; the agencies for distribution are rapidly coming under their undisputed control; and unless prevented and restrained their complete unchallenged dominion of every branch of commerce in tobacco and its products may be confidently expected at an early day.

The petition details the output of manufactured tobacco products by defendants and totals for the United States in 1906. [For output 1907 see *ante*, p. 14; and for each year since 1890 see Appendixes "F" to "M" hereto.]

PRAYER (Par. XIX, R. I, 107).

1. That the contracts, combinations and conspiracies, attempts to monopolize and the monopolies described be declared in violation of the Act of July 2, 1890, and subsequent Acts, and be prevented and restrained.

2. That the contracts, combinations and conspiracies entered into September 27, 1902, and thereafter, and evidenced by the English writings of that date (R. I, 111-133) be declared illegal, and that defendants be prohibited from doing anything in pursuance thereof within the United States.

3. That The Imperial Tobacco Company, its officers, agents and servants be enjoined from engaging in interstate or foreign trade and commerce, within the United States, until they shall cease to observe the agreements of September 27, 1902 (R. I, 111-133).

4. That the British-American Tobacco Company be adjudged an unlawful instrumentality created to carry

into effect the objects and purposes of the contracts of September 27, 1902, and that it be enjoined from engaging in interstate or foreign commerce within the United States.

5. That it be adjudged that The American Tobacco Company, the American Snuff Company, the American Cigar Company, the American Stogie Company, the MacAndrews & Forbes Company and The Conley Foil Company is each itself a combination in restraint of commerce; and that each is attempting to monopolize and has monopolized part of commerce. And that each of them be restrained from engaging in interstate or foreign commerce; or, if the public interests will be better subserved thereby, that receivers be appointed to take possession of all their property, assets, business and affairs, wind them up, and otherwise take such course as will bring about conditions in harmony with law.

6. That holding stock by one defendant corporation in another be declared illegal and that they be enjoined from continuing to hold or own such shares and from exercising any right in connection therewith or permitting the exercise of any such right.

7. That defendants be enjoined from continuing to carry out the purposes of the above-described contracts, combinations, conspiracies and attempts to monopolize by the means herein described, or any other, and be required to withdraw from all connection therewith.

8. That they be enjoined from purchasing leaf tobacco or from selling and distributing its manufactured

product as a part of interstate and foreign trade and commerce in conjunction or combination, and from taking part or being interested in any agreement or combination intended to destroy competition.

And for General Relief and Process.

X.

Answers and Admissions.

Welford C. Reed answered and afterwards died—there has been no revivor. R. P. Richardson, Jr., & Company, Inc. (which has not appealed), United Cigar Stores Company and The Imperial Tobacco Company each appeared by different counsel and answered. The British-American Tobacco Company filed a separate answer; The American Tobacco Company and all remaining defendants filed a joint and separate answer.

Certain written admissions (Ex. 8, R. V, 1) were entered for all the defendants except the Richardson Company and the Imperial Company, and were accepted by the latter subject to correction if shown to be untrue (R. II, 4). Following the paragraphs of the petition, these specify the allegations agreed to—generally those which relate to acquisitions, formation of companies, profits, etc. Among other things this appears (R. V, 31)—

> We admit that all the vendors and corporation defendants mentioned in the petition as engaged in the manufacture and sale of tobacco products, except Imperial Tobacco Company, Ltd., purchased or now purchases some or all of the requisite raw material in States or countries other than those in which the factories were or

are located, and had or has it transported thence through the medium of common carriers to said factories, and employed or employ traveling salesmen who solicited or solicit in States or countries other than those in which the factory was or is located, orders for the tobacco products which by them were or are transmitted to said factory or other chief office of the manufacturer, and, if approved, they are filled by the delivery of the goods to a common carrier where the factory was or is located, duly consigned to the purchaser, title passing to said purchaser on said delivery to the common carrier.

ANSWER OF THE AMERICAN TOBACCO COMPANY AND OTHERS (R. I, 204-263).

This fills fifty-nine pages. It admits, specifying details, the organization of various companies, purchase by them of sundry plants and businesses with good-will and covenants by the vendors, and the general unification of interests through consolidations and acquisitions of stock, all substantially as alleged. It denies intent to destroy competition or acquire monopoly; and further declares that no purchase was made to remove the competition of a vendor—brands, properties and businesses having been bought for investment only with a view to their present and ultimate profitableness, all as permitted by State charters.

It declares that the various companies, a majority of whose stock is held by some other, are either run as branches of the owner—the separate organization being preserved for trade purposes—or that they are man-

aged by minority stockholders and are uncontrolled by and in active competition with the owning companies and with each other; and that interstate and foreign commerce have not been restrained or monopolized.

> Competition between The American Tobacco Company and various other tobacco manufacturing companies is the same whether The American Tobacco Company owns all the stock, a part of the stock, or none of the stock at all, for these various corporations, except those like Blackwell's Durham Tobacco Company, which are in fact only branches of The American Tobacco Company, conducted as separate corporations only for trade method or trade-mark purposes, have their own leaf buying plants, and their own selling organizations, and it would serve no profitable purpose to any one, but would be destructive of the tobacco business, to attempt to eliminate or lessen competition. In truth, the competition between different similar brands of tobacco owned by the same manufacturer is just the same as if there were not such common ownership. (Ans. R. I, 220, 221.)

Touching the allegations that unification of buying has given defendants power to control prices of leaf tobacco, manipulate the market, etc., they say (R. I, 261)—

> The presence or absence of any given amount of competition in the purchase of leaf tobacco can have no permanent effect on the prices paid for such leaf tobacco. If there were an absolute monopoly in the purchase of leaf tobacco a fair price would have to be paid or the land would go into these other crops; and if by many com-

petitors bidding for leaf tobacco or otherwise, more than a fair price should be paid, there would result the growth of an over-supply of tobacco, which over-supply could only be stopped by a reduction in the price. Therefore, The American Tobacco Company has never had the slightest interest in eliminating competition in the purchase of leaf tobacco, and in those cases where it has bought for other manufacturers, or had other manufacturers buy for it, it has been actuated only by a desire to make more efficient and economical the organization for buying, and not at all the withdrawal of competition.

All unlawful action is denied; the benign purpose of the agreements by which the consolidations and unifications have been brought about are dwelt upon; and the present existence of divers successful competitors and the possibility of future ones are pointed out.

The execution and observance of the English contracts of 1902 are admitted. It is said, however, that these were valid where made and were not entered into for the purpose of destroying competition or restraining commerce but in connection with valid sales of property and business. Among other things this answer says of the English situation (R. I, 245-247)—

> Long before the American Tobacco Company was organized and until the formation of The Imperial Tobacco Company, to be hereafter referred to, the largest tobacco manufacturing house in England, was W. D. & H. O. Wills, Ltd., of Bristol, a very old, reputable, skillful and successful manufacturer. The products of the said Wills had an excellent reputation and sale all over the world, and, notwithstanding the

great disadvantage that said English house was in competition with American manufacturers, because of a high tariff tax, the tobaccos manufactured by the said Wills had considerable sale and a very excellent reputation substantially all over the United States. * * *

In December, 1901, said W. D. & H. O. Wills, Ltd., and other English manufacturers caused the formation of The Imperial Tobacco Company (of Great Britain and Ireland), Limited, and these various manufacturers sold their businesses to the said The Imperial Tobacco Company.

Expansion and ever increasing power are thus explained (R. I, 259, 260)—

The American Tobacco Company has been a successful and growing corporation engaged in the tobacco business; its officers and employees have been practical tobacco men; investors in its securities have had confidence in its management. These officers and employees have kept in touch with the tobacco trade and have given study to the tobacco business; they have made investments of the money of the security holders of the company from time to time in tobacco brands, not with a view of lessening the competition against the brands already in existence, and not with a view of monopolizing the business, but because the tobacco business was the business in which they were engaged, the business which they were best capable of running, and the business of whose value they were best able to form a judgment when about to make an investment. Most of the brands acquired have been taken into the organization and thereafter

have been manufactured and sold by the regular organization of The American Tobacco Company. The brands have naturally improved in quality under this condition, because they have had the benefit of the efficient manufacturing organization and the ample leaf supply of The American Tobacco Company. The percentage of expenses of selling have diminished, because the selling organization of The American Tobacco Company already covered the whole country. * * *

Sometimes, though, The American Tobacco Company has realized that the marketing of some particular product could be best done by leaving it in the hands of the previous owners, or by putting its selling into some organization other than that of The American Tobacco Company. When this has seemed best The American Tobacco Company has left it in the separate organization, and while always willing to give such organization the benefit of its knowledge of the trade, has left such organization to work out its own salvation, aided by information and advice from The American Tobacco Company's organization, but never controlled or compelled by such organization. In some of these cases the selling has been by a different organization, while the manufacturing and leaf purchasing has been by The American Tobacco Company's organization. If so, it was because of the deliberate belief of The American Tobacco Company's organization that its facilities for manufacturing or buying leaf were more efficient or economical than would be the manufacturing or buying organization of the separate corporation. Sometimes, as in the case of the

American Snuff Company and the Imperial Tobacco Company, it has made an investment and secured a minority of stock in a tobacco business, leaving the power of control, as well as the actual direction, in other hands.

ANSWER OF THE UNITED CIGAR STORES COMPANY (R. I, 190-197).

This denies generally most of the allegations in the Petition, but admits—

Incorporation in New Jersey (May, 1901) by George J. Whelan and associates, who conducted the business for several months and demonstrated its probable success; issued capital stock $1,650,000, bonded indebtedness $2,850,000; that in November, 1901, The American Tobacco Company acquired a majority of the shares and now holds $600,000 of the $900,000 common stock, all of the preferred ($750,000) and all the bonds —$2,850,000; ownership of stock in sundry companies; establishment of stores in different cities and efforts to secure retail business; buying out dealers in tobacco products and taking covenants not to engage in the business; and that some of the vendors are intimately connected with its affairs.

It denies all unfair trade methods, any attempt to monopolize, that it is improperly used to increase the sale of tobacco products of other defendants, or to cripple their competitors, or that it has procured and forced the retirement of many retailers.

[The Answer of The American Tobacco Company undertakes to describe how control of this company was acquired.—R. I, 225.]

ANSWER OF R. P. RICHARDSON, JR., & COMPANY, INC. (R. I, 265-279).

This first admits most of the allegations and then says: Defendant and its predecessors located at Reidsville, N. C., have been long successfully engaged in interstate commerce, buying tobacco in different States and selling and distributing the products manufactured therefrom in many of the States of the United States but not abroad; chartered and organized in New Jersey in 1903; The American Tobacco Company never legally acquired a controlling interest in its stock, although practically all holders entered into an agreement with that Company to sell 60 per cent. of the common stock and vendors agreed for fifteen years not to engage in like business, but no transfer was ever made upon the books; a separate organization has been preserved; no agreement with The American Tobacco Company not to compete has been made, and it has not been used as an instrument for crippling competitors.

The American Tobacco Company waged against defendant fierce, unwarranted competition for the purpose of crippling or destroying its business and in 1903 set on foot negotiations to acquire the same; and because of such competition and the fear of destruction defendant's stockholders agreed to convey a controlling interest to that company which thereafter, contrary to the understanding, attempted to control and dominate its affairs and to use it to break down and destroy others for the purpose of destroying competition and acquiring a monopoly (R. I, 270-271). The result was a suit, still pending, to rescind the agreement and

restore the stock to original holders. [This Company has not appealed and in open court expressed its approval of the decree below.—R. I, 334.]

ANSWER OF THE IMPERIAL TOBACCO COMPANY (R. I, 174-183.)

This admits incorporation and organization under the laws of Great Britain, capital 18,000,000 pounds sterling, bonded indebtedness 2,065,000 pounds; that defendant is engaged in carrying on business in Virginia and other States; that for a long time many separate competing concerns with plants in Great Britain bought leaf tobacco, converted the same in the United Kingdom into products for consumption and sold and distributed them there and shipped them to the United States and throughout the world; that many of these concerns were old, well established and possessed large assets and world-wide reputations (R. I, 175); that in 1901 The American Tobacco Company purchased Ogden's, Limited, of Liverpool, and through it endeavored to sell and distribute its manufactured goods, the result being a trade conflict between it and English manufacturers, many of the leading and strongest of which combined in order to protect their interests. That defendant was incorporated in 1901, and in exchange for stock received conveyances of the business and plants of leading English concerns which, together with subsequent acquisitions, are operated and conducted by it; that during 1901 and 1902 there was commercial conflict in the United Kingdom between the American companies and defendant; that the written

agreements of September, 1902, attached as exhibits to the Petition, were executed in Great Britain and have been observed.

This defendant denies any conspiracy with any other defendant, any agreement in restraint of trade and commerce among the several States or with foreign nations, and any attempt to monopolize any part of such trade. And it asserts that the English contracts of September, 1902, were entered into without purpose of restraining trade or commerce in the United States or between the United States and Great Britain, and to protect it from serious competition in the latter country in the business of manufacturing and selling, to which commerce no legislation of the United States has application. The validity of the agreements depends upon the law of England where they were executed (there is no statement of the law of England); that in September, 1902, the export business of manufactured tobacco from the United States to Great Britain was small compared with the total business in that Kingdom, and like export business from Great Britain to the United States was small compared with the total because of high duties, etc.; that the agreements were not entered into with the view of restraining trade and commerce between the United States and Great Britain, since the exports at that time were not sufficiently large to induce such action, and so far as there was intent to reduce competition between the parties it was that existing in great Britain. The written agreements relating to the British-American Tobacco Company, Limited, did not operate in restraint of interstate or foreign

trade or commerce within the meaning of the Anti-Trust Act; but so far as they attempted to restrain the export of manufactured products from the United States to foreign countries other than Great Britain, such restraints resulted from covenants based on *bona fide* sales of the export business of The American Tobacco Company and of the Imperial Tobacco Company and others; that defendant is a corporation under the laws of England, with principal place of business in Bristol, almost all whose stock is held by British subjects; that its business is principally carried on within the United Kingdom; that the written agreements were all entered into there; and that neither the Anti-Trust Act nor any other Act of Congress can have application to defendant, its directors, officers, agents, or to said agreements.

ANSWER OF THE BRITISH-AMERICAN TOBACCO COMPANY (R. I, 198-203).

This consists largely of general denials. It admits the contract of September, 1902, but says this was entered into in England to be construed and take effect as a contract of that country where it was legal and valid, and further that valuable consideration was given for the businesses and assets acquired. Defendant denies that it was created as an instrument for the special purpose of defeating the laws of the United States or that it has done anything in violation thereof; but admits that its requirements of leaf tobacco are purchased by The American Tobacco Company in the United States under an arrangement between them and that it owns stock of sundry companies which manufacture, sell and distribute tobacco throughout the world.

XI.

Concerning the Evidence—Especially that Relating to Controverted Matters.

The answers and written admissions establish the organization, business, capitalization, and stock ownership amongst defendants and others, together with purchases, conveyances, restrictive covenants, consolidations, execution and observance of the English agreements of 1902, and financial results obtained—all substantially as set forth in the Petition. It is therefore unnecessary to recite with particularity the evidence on these points. The summary of the Petition *ante* gives the essential facts.

The record discloses how competitors in commerce have been systematically brought under one control, and dominion of markets obtained. The principal witnesses introduced by the Government were interested in defendant corporations and were called because acquainted with the inside facts. Their hostile position, natural bias and manifest disposition must be considered. They could not be relied on for accurate information in response to general questions; the Government consequently introduced a great number of their letters which clearly reveal specific acts and purposes.

The testimony of struggling independent manufacturers appeared non-essential, and to subject them to probable inquisitions concerning their private affairs unwise. An illustration of defendants' attitude towards witnesses is presented in the cross-examination of Hillman, a New York merchant (R. III, 485-507),

called to explain the destruction of tobacco jobbing there occasioned by the exclusive selling agency which defendants gave Metropolitan Tobacco Company. The evidence was taken before an Examiner with very restricted powers.

The number of defendants, the multitude of transactions and a record of reasonable size required the Government to limit its evidence to important, characteristic matters adequate to support the essential allegations—the endless details would have consumed much time and obscured real issues.

The facts concerning some characteristic transactions were brought out in order to show the falseness of defendants' claim that competition existed among them; their power; their actual wicked, unlawful intent; their practice of unfair methods; and their use of combined power to oppress and destroy. To this end much correspondence was introduced concerning the operations of companies secretly controlled but held out as independent.

The Government has proved how commerce in tobacco leaf and products developed under free competition; the organization of The American Tobacco Company in 1890 for manufacturing and trading with $25,000,000 capital—greatly inflated—to take over the leading cigarette makers and monopolize that business; and how, pursuing a fixed purpose to destroy competition, dominate, control and monopolize, its capital stock was increased; its connection, power and operations

extended by attacking and acquiring competitors, by buying or consolidating competing interests, by securing control of corporations, etc., until the combination's annual demand for leaf increased from 15,000,000 to 450,000,000 pounds and practical monopoly of the trade has been secured. The associates are now everywhere dominant factors in the tobacco trade, with no competition amongst them, and with full power to control prices of raw products and manufactures and to prevent the probable success of any one who may want to compete.

The purpose to destroy competition, to expel those in business, deter others from entering and to monopolize is a necessary inference from defendants' uniform course; but specific acts were proven, *e. g.*, the use of secretly controlled corporations, selling goods below cost, controlling the avenues of distribution, etc. Likewise, their power necessarily appears from the established conditions; but illustrations of its exercise have been presented, *e. g.*, the concerted action of New England jobbers in refusing to handle independent goods; the concentration of tobacco jobbing in New York City in one company; terrific competition against the ~~National~~ Tobacco Works and the Richardson Company in order to destroy or purchase them, etc.

The question of prices for tobacco products was not entered upon. It seemed irrelevant, however important from an economic standpoint. But this has been carefully investigated by the Bureau of Corporations and the results are in its report of June 5, 1909, to the

Senate. The "Trust" has materially advanced prices. Tables from the report are appendixes "N" to "Q" hereto.

For like reasons, little evidence was introduced concerning prices of leaf. But the record shows that demand has steadily increased while the supply has decreased; that prices dropped below cost of production immediately after the combination of 1902 between the Imperial and American companies; and that the value of fancy grades, nearly all of which are bought by the "Trust," have declined, while less expensive ones, for which some competition still exists, have materially advanced. The decreasing supply, larger demand, greater cost of land and labor, and well-known, concerted, energetic efforts of the farmers to protect themselves sufficiently account for any advance. The destruction of competition and ever-increasing purchases certainly enable defendants unduly to influence the markets.

The individual defendants—officers, agents and directors of the corporations—control the combination's complicated affairs. James B. Duke has been the central figure from the beginning and the present situation is due largely to his masterful manipulations.

The answers, admissions and testimony support every essential allegation. As above pointed out, no substantial dispute exists concerning the great mass of specific facts set forth in the petition. But defendants do emphatically controvert all allegations concerning unlawful intent, power to control and effect of their

action on commerce. They also assert that their purchases were for investment; that competition has not been improperly destroyed; that they have no power to destroy it; that they have no monopoly; that they have not acted oppressively or wickedly or practiced unfair trade methods; and that their course has not been characterized by intent to destroy competition or gain monopoly.

The groundlessness of these denials and assertions when not otherwise apparent is shown by some portions of the evidence especially referred to below, with citations. To collect all would unduly extend this brief; an examination of the Record is essential to complete understanding of the complicated situation.

TRADE AND COMMERCE IN TOBACCO AND RELATED PRODUCTS PRIOR TO 1890.

The methods of independent concerns trading in tobacco, etc., prior to 1890, described in the petition (R. I, 12-15) are not contraverted. Witness Dula (R. II, 447, 448) testifies that "brands" began to be general some time prior to 1880, and explains other developments; also how leaf was formerly obtained and manufactured products disposed of. F. S. Kinney (R. II, 530 *et seq.*); R. K. Smith (R. II, 156 *et seq.*); Cobb (R. III, 1, 50); Yuille (R. II, 89), and Carlton (R. IV, 229), gave similar testimony.

Formerly leaf tobacco was sold at many independent competing warehouses. The purchasing power of defendants has forced unification of these and enables them to dominate the business (Dunkerson, R. IV, 93-97).

Long well established "Brands" are "just like bread" (Harris, R. III, 569) and jobbers "have got to handle them" (Letts, R. IV, 467). The method of advertising them, without reference to the manufacturer, is illustrated by Exhibits 68 and 69 (R. V, 507). Exhibits 62 and 63 (R. V, 488) give the enormous consumption of defendants' leading brands, with their originators; and Exhibits 64 and 65 (R. V, 489-505) the great number which they manufacture and sell at all kinds of prices.

ORGANIZATION OF ORIGINAL AMERICAN TOBACCO COMPANY IN 1890—ITS PURPOSES—ACQUISITIONS—AND EXTENSION OF BUSINESS.

In 1885, W. Duke, Sons & Company was incorporated in North Carolina to manufacture and trade in cigarettes and smoking tobacco, with $250,000 capital, then the fair value of the assets; and between it and four other concerns—Allen & Ginter, Richmond, Va.; Kinney Tobacco Company, of New York; W. S. Kimball & Company, of Rochester, New York; and Goodwin & Company, of Brooklyn, New York, there was fierce competition here and abroad during the five succeeding years (Duke, R. IV, 334-337). In January, 1890, after protracted negotiations, the parties controlling these interests incorporated The American Tobacco Company in New Jersey and became its officers and directors—J. B. Duke then and ever since President. By agreement the entire $25,000,000 capital was apportioned amongst them—Duke, Sons & Co., the largest, receiving $7,500,000—and the assets, goodwill, etc., of all were conveyed to the corporation, but

without covenants against competition (Kinney, R. II, 530-536; Duke, R. IV, 337). In this way the Company at once secured a monopoly (95 per cent.) of the cigarette business, and began to make large profits. Its charter provided (R. V, 34)—

> The objects for which the Company is formed are to cure leaf tobacco, and to buy, manufacture and sell tobacco, in all its forms, and to establish factories, agencies and depots for the sale and distribution thereof, and to transport or cause the same to be transported, as an article of commerce, and to do all things incidental to the business of trading and manufacturing aforesaid.
>
> (This was amended April 20th, 1901, by adding the following words: "To indorse or otherwise guarantee the principal or interest, or both, of and on any bonds, debentures or promissory notes that may be made, issued, or uttered by any corporation in which said Company has a substantial interest as stockholder, provided that authority for such endorsement or guarantee be first obtained from the Board of Directors by resolution having the favorable vote of at least two-thirds of the whole Board.").
>
> The portion of the business of said Company which is to be carried on out of said State is to cure leaf tobacco, and to buy, manufacture and sell tobacco in all its forms, to establish factories, agencies and depots for the sale and distribution thereof, and to transport the same as an article of commerce, and to do all other things incidental to the business of the Company which must necessarily be transacted out of said State. The Company proposes to carry on its opera-

tions in all the other States and Territories in the United States, and in Canada and in Great Britain, and in all foreign countries.

Shortly after the combination, the Goodwin & Company factory was closed and the directors ordered "that the manufacture of all tobacco cigarettes be concentrated at Richmond." (Minutes, Ex. 39, R. V, 191-192.)

Since 1891 The American Tobacco Company, its subsidiaries and associates have persistently acquired for cash or stock the property, plants, business and controlling shares of many competitors in interstate and foreign commerce, taking from owners, stockholders and others stipulations against future competition; and they have also acquired the leading popular brands and secured a rapidly-increasing portion of the entire trade (Ex. 77 *et* seq., R. V). Its capital was increased July, 1891, from $25,000,000 to $35,000,000—$14,000,000 preferred and $21,000,000 common; March, 1899, to $70,000,000—$14,000,000 preferred and $56,000,000 common (Ex. XI, R. V, 38); and in April, 1901, a charter amendment gave power to endorse and guarantee securities (Ex. XI, R. V, 34, 35). Exhibits 32, 33-37 (R. V, 132, 137-185) illustrate the often adopted procedure of organizing a controlled company in New Jersey to take over a competing business, with restrictive covenants from the vendors (R. V, 114 *et seq.*).

The purchase and dissolution of the Union Tobacco Company in 1899 is a striking example of smothering competition. That company was organized in 1899, with William H. Butler at its head, and Ryan, Whit-

ney, Brady, Elkins, Widener and others interested. It appeared formidable and was accordingly bought and buried by The American Tobacco Company (Minutes relating to transaction appear in Ex. 39, R. V, 199, 200). Butler says (R. III, 405, 406) it operated six or eight months and had a small business; that he put no money in, but took out $500,000. According to Defendant Duke (R. IV, 367, 375), the purpose was not to suppress competition, but to enlist "that crowd" of financiers, those interested in The American Tobacco Company not being sufficiently strong. As the latter Company had just declared a dividend of 100 per cent. in stock (Ex. 39, R. V, 201) and 6 per cent. in cash, surely no assistance was needed for legitimate purposes.

CONTINENTAL TOBACCO COMPANY—THE PLUG COMBINATION.

Prior to 1898, The American Tobacco Company and others were fiercely competing in the manufacture and sale of plug tobacco. In 1893 it sought to combine these interests (R. V, 192), but failed, and thereafter its plug business was conducted with heavy loss—in 1895, $892,687; 1896, $1,378,345; 1897, $889,730; 1898, $926,302 (see Report, Bureau of Corporations on "Prices of Tobacco," June 5, 1909, p. 35; for Minutes showing large losses see Ex. 39, R. V, 192, 193).

In 1898, after long negotiations, The American Company and certain leading plug competitors (specified in Pet., R. I, 30, *ante*, p. 93) with plants in Missouri, New Jersey, Ohio, Kentucky, Michigan and Virginia (Ray, R. II, 86-88; Smith, R. II, 166; Dula, R. II,

453-455), organized in New Jersey the Continental Tobacco Company for "trading and manufacturing," with $75,000,000 capital—afterwards $100,000,000—half common, half preferred (Ex. 12, R. V, 39). As agreed in advance they apportioned the shares amongst them, immediately conveyed their plug business and connected properties to the new company, with covenants against competition, and the owners and officers of the old concerns became its stockholders, officers and directors—James B. Duke, President. The Charter provided (R. V, 39)—

> The objects for which this corporation is formed are to cure leaf tobacco, and to buy, manufacture and sell tobacco in any and all its forms, and to erect, or otherwise acquire factories and buildings, establish, maintain and operate factories, warehouses, agencies and depots for the storing, preparation, cure and manufacture of its tobacco and for its sale and distribution, and to transport or cause the same to be transported, as an article of commerce, and to do any and all things incidental to the business of trading and manufacturing aforesaid. To endorse or otherwise guarantee the principal or interest, or both, of and on any bonds, debentures or promissory notes that may be made, issued or uttered by any corporation in which said company has a substantial interest as stockholder, provided that authority for such endorsement or guarantee be first obtained from the Board of Directors by resolution having the favorable vote of at least two-thirds of the whole Board.
>
> This corporation shall also have power to

> conduct its business or any portion of it in all other states and territories, colonies and dependencies of the United States of America and in Great Britain and Canada and all other foreign countries, to have one or more offices out of the State of New Jersey, and to hold, purchase, lease, mortgage and convey real and personal property out of the State of New Jersey as well as in said State.

The Continental and American companies were operated with the same general purpose, the former being confined principally to plug, the latter to other departments of the trade (Harris, R. II, 16; Duke, R. IV, 366). Both actively acquired competitors (for list see Pet., R. I, 34-38, *ante,* p. 94) and rapidly increased their power. The Continental purchased leaf for the plants which had previously maintained independent buyers (Smith, R. II, 164, 168-171) and sold the combined output.

The manipulations attending the combination through the Continental produced some striking results. Prior to 1898 the plug business of The American Company entailed heavy losses—during 1898—$840,000 (Ex. 39, R. V, 233). Nevertheless, for this with plants, assets, etc., connected therewith, the Continental exchanged $30,000,000 of its stock, and in addition paid the $840,000 loss (Ex. 39, R. V, 196, 197; Duke R. IV, 350, 353, 357). The American Company was treated as though it had made a profit, and having promptly increased its authorized capital from $35,000,000 to $70,000,000, declared a stock dividend of 100 per cent. on the common stock—$21,000,000 (Ex. 39, R. V, 201).

Competition between the Continental and its strongest competitor, the Liggett & Myers Company, at St. Louis, was destroyed in 1899 by the manipulations of James B. Duke and others, and the former acquired the latter's business and assets, together with $5,000,000 cash, by issuing therefor $35,000,000 stock (Dickerman, R. III, 393, 394; George P. Butler, R. III, 574, 575; J. B. Duke, R. IV, 361-363).

CONLEY FOIL COMPANY—TIN-FOIL MONOPOLY.

In December, 1899, the American Tobacco Company procured the incorporation of the Conley Foil Company—a controlled company—in New Jersey, with $250,000 capital (afterwards $375,000 and $825,000) —for "trading and manufacturing" (See Charter, R. V, 69), and this in exchange for stock, with the usual covenants, took over John Conley & Son (partnership), which in 1899 manufactured 4,500,000 pounds of foil (Conley, R. III, 150). It afterwards acquired all shares of the Johnston Tin Foil & Metal Company at St. Louis, a leading competitor (Conley, R. III, 158-161), but long concealed and denied the connection (Conley, R. III, 161, 300). These two now manufacture and distribute annually 16,000,000 pounds of foil—more than two-thirds of the total produced in the United States (Conley, R. III, 157). Of such output defendants purchase at least 70 per cent. under contract prices, based on cost of material and yielding good profits (Conley, R. III, 154, 157). Only one important competitor remains; and all opponents are supposed to make about 6,000,000 pounds yearly (Conley, R. III, 161, 162). The American Company holds $495,000 of the stock

(Conley, R. III, 303). Unfair methods are referred to later.

AMERICAN SNUFF COMPANY—SNUFF MONOPOLY.

In March, 1900, under preliminary agreements, parties controlling the concerns to be acquired (Ex. 34, R. V, 148; Helme, R. II, 437, 438) organized the American Snuff Company in New Jersey and became its officers and directors. The $25,000,000 capital stock was apportioned among them (See Charter, Ex. 16, R. V, 57; Helme, R. II, 436; Condon, R. IV, 489, 490), and it immediately took over the snuff business of the American and Continental companies, P. Lorillard Company, the Atlantic Snuff Company and the George W. Helme Company, the leading snuff producers, with covenants against competition. The agreements are Exhibit 34 (R. V, 148-164). The Snuff Company at once began to acquire business and plants of competitors, taking the usual covenants (Helme, R. II, 442) and continued until no formidable one remains. The answer (R. I, 263) mentions one survivor—the Byfield Snuff Company—which produces 160,000 pounds annually and operates in New England (Choate, R. IV, 305). In order to eliminate this insignificant competition the American Snuff Company for years has been selling, in that territory exclusively, far below cost (Choate, R. IV, 304-308; Smith, R. III, 189, 190).

The American Tobacco Company in its own name holds 52,822 shares of Snuff Company stock; the P. Lorillard Company, a subsidiary, holds 45,841 shares—together 98,663 shares. This is more than 40 per cent., enough to control, and an actual majority at stockhold-

ers' meetings in 1905, 1906 and 1907 (Christian, R. III, 225; Ex. 50, R. V, 427-437). J. B. Duke, President, and four Vice-Presidents of The American Company are directors of the Snuff Company, and directors of the former are large stockholders in the latter (Ex. 45, 47, R. V, 356, 362). P. J. Maloney, of the Snuff Company, is on the Committee in charge of leaf purchases for the combination (Yuille, R. II, 101, 102). The two companies are jointly interested in an insurance scheme, in the Amsterdam Supply Company, have their offices in the same building, the same law department; their affairs are so interwoven as to preclude semblance of competition (Christian, R. III, 238).

From its organization in 1900 to July 31, 1907, the Snuff Company purchased 244,578,666 pounds of leaf, and used 162,021,496 pounds, the remainder being turned over to others (Christian, R. III, 224). It pays 10 per cent. dividends on common stock, 6 per cent. on preferred, and has accumulated a large surplus. It has a dollar of stock for every pound of output (worth 40 cents); and the profits upon actual business are enormous (Ex. 53, R. V, 466-468). For the history of acquisitions by this company, etc., see evidence Otis Smith (R. III, 180-217).

AMERICAN CIGAR COMPANY—CIGAR COMBINATION.

In 1901, by preliminary agreement (see Ex. 35, R. V, 165) parties controlling the American and Continental companies, and Powell, Smith & Company, organized and became officers of the American Cigar Company, of New Jersey (see Charter, Ex. 15, R. V,

52), with $10,000,000 capital (afterward $20,000,000), which immediately took over the cigar, stogie and tobie business of the three, issuing stock therefor and taking covenants against competition (Ex. 35, R. V, 165; Ex. 39, R. V, 209, 210-211).

Pursuing the general plan, the Cigar Company has acquired, by direct conveyances, etc., or through stock control, the plants and business of competitors in the United States, Cuba and Porto Rico (for list see Pet., R. I, 76-79). In the two latter countries it owns plantations and is dominant in the cigar, cigarette and tobacco business, foreign and domestic (Cobb, R. III, 16-27, 35, 40, 79). It has an organized department for the purchase of leaf with agents in important markets (R. III, 38); also factories in various States and abroad, whose output it sells and distributes in interstate and foreign commerce (Cobb, R. III, 36-37). Within seven years it has secured 14 per cent. of manufacture, trade and commerce in domestic cigars (Exs. 83, 85, R. V). The American Tobacco Company loans it large sums—aggregating sometimes more than $5,000,000—and it loans to subsidiaries (Cobb, R. III, 93).

CONSOLIDATED TOBACCO COMPANY.

The attempt to monopolize the cigar business through the American Cigar Company (1901), to acquire the English trade through Ogdens (1901), and to further extend the monopoly, demanded large capital (Duke, R. IV, 377). In part to provide funds, but especially to secure fixed control of the American and

Continental companies by a few men (6), the Consolidated Tobacco Company, a holding corporation, was organized in New Jersey (June, 1901) with $30,000,000 capital (afterwards $40,000,000), perpetual existence and broad powers, to manufacture and trade in tobacco, and to hold and guarantee dividends upon or payment of securities of other companies, etc. (see Charter, Ex. 13, R. V, 45); J. B. Duke became President. A few shares over a majority were taken and held during the company's existence by six men—Anthony N. Brady, J. B. Duke, Oliver H. Payne, Thomas F. Ryan, William C. Whitney and Peter A. B. Widener (Ex. 49, R. V, 423). Chiefly in exchange for its bonds this company procured nearly all the common stock of the American and Continental companies and controlled both. Defendants Cobb (R. III, 32, 33) and Duke (R. IV, 377) say that it was organized to supply funds to the American and Continental companies, but manifestly their ordinary business demanded no such extraordinary course and selling out control of itself is not the customary way for raising company funds. The plan was used to acquire competitors and extend monopoly (Pet., R. I, 34-37; Ex. 8, R. V, 27). The Consolidated yielded enormous profits until 1904 when it was merged with the American and Continental (Financial Statement, Ex. 52, R. V, 462-465).

UNITED CIGAR STORES COMPANY—RETAIL BRANCH OF COMBINATION.

In May, 1901, the United Cigar Stores Company was incorporated in New Jersey by Whelan and others, with $2,500 paid-up capital (Whelan, R. III, 97-100),

to sell and distribute tobacco products at retail; and began a small business. Its working capital having been increased to $52,000, in November, negotiations between Whelan and Hill, Vice-President of the American Company, acting under direction of Duke, resulted in the stock control by the latter, and it has since furnished large sums for the business (Whelan, R. III, 99, 109), issued instructions concerning the opening of stores, and otherwise directed operations (Cobb, R. III, 45-47). Defendant Duke says (R. IV, 415)—"I told Mr. Hill to watch that and if they were really going to do anything great in it we should have some control of it." The present paid-up stock is $1,650,000; $600,000 of the $900,000 common, all preferred, $750,000, and $2,850,000 bonds are held by the American (Ex. 8, R. V, 17).

The United Company has established 400 retail stores—in the principal cities of New York, New Jersey, Pennsylvania, Ohio, Maryland, District of Columbia, Connecticut, California, Washington, Delaware, Oregon, Texas, Massachusetts, Rhode Island, Illinois, Minnesota, Michigan, Indiana, Missouri, Wisconsin, Kentucky and other States (Whelan, R. III, 98). In the City of New York it operate 160 (Whelan, R. III, 98). It buys goods in different States, assembles them in central warehouses, and then distributes them to the retail stores throughout the country; and is actively engaged in interstate commerce (R. III, 107). It has subsidiary companies (see Pet., R. I. 58-60, *ante*, p. 102), promotes and furthers the sale of defendants' products, and obstructs independent goods (Hill, R. III,

130). Whelan (R. III, 122) says concerning purchase of majority stock of the United Company by the American Company—"I thought at the time they did not intend to continue it and bought control of it in order to stop us from doing things that might be an injury to them."

The following is from Hill, Vice-President of the American (March 7, 1903), to Whelan, President of United Company (R. III, 130, 131)—

> Dear Sir.—My attention has been called to the disposition on the part of some of your employes at certain of your stores to further the sale of goods competing with similar goods of our manufacture.
>
> You will remember that when you undertook your enterprise you distinctly agreed with us that in view of our not antagonizing your proposition you would always further, so far as you possibly could, the sale of our products; in fact, we stated to you that unless this was done we would consider it to our interests to hamper your enterprise in every way we could, but if you would give our products preference we could not see any reason for interfering with your intention of engaging in a large way in the retail cigar and tobacco business if you thought it a good commercial proposition.
>
> The complaint we make we will be glad to have you take up and correct; not only because it is in accordance with your agreement, but also because we will be obliged to protect our interests as we may see proper, unless our products receive the benefit of the co-operation of your company. [A list of places where "the wrong goods" were recommended follows.]

The United Company is an instrument for acquiring control of the retail trade and further crippling competitors (Schulte, R. III, 464-465). For a long time the stock owned by the American Company was not carried in its name (Whelan, R. III, 101; Hill, R. II, 232), and the connection was stoutly denied. The following was written by Hill (September 29, 1902) ten months after control was acquired (R. II, 232)—

> Mr. Frederick Estabrook, Boston, Mass. Dear Sir: We are hearing a good deal here about the United Cigar Stores Co. opening up in Boston, and I also understand that your firm proposes extending your retail business. I will be very glad if such proves to be the case, as I would be very much pleased if your firm were to become even more influential than it is at present, in a retail way, as a protection against this new company in Boston.
>
> We have no reason to doubt the good feeling of the United Cigar Stores Co. towards us, but it will be a source of much gratification to us to know that your firm, in which we have every confidence, is in a strong trade position.
>
> *Of course all rumors to the effect that our company is back of the United Cigar Stores Company are entirely without foundation, as we have no financial interest whatever in that company.* Yours very truly, Percival S. Hill, First Vice-President.

February 20, 1906, Harris, Vice-President American Company, wrote Whelan (R. III, 520)—

> It has just occurred to me that when you get to London you will have to be pretty careful in making payments for what you may buy in such

> a way as not to admit of their being traced to you or the British-American—in other words, instead of having the British-American pay by its own check, have it go to the bank and get what we would call a Cashier's Draft. You will of course see the force of this. * * * The same thing will apply in Germany.

Writing to defendant Duke, November 6, 1902, Hill says of the United Co. (R. III, 127)—

> Acting on the advice of our different people here we have instructed these stores not to open up in other localities than those in which they are now located.

This company has bought out dealers with covenants against competition (Whelan, R. III, 99); at tremendous cost has set up prominent retail stores in large cities; and supported by the confederates is seeking to control the retail trade (Schulte, R. III, 462, 466-467). It has a decided advantage over other retailers in being permitted to purchase the goods of the allied companies at wholesale prices (Hill, R. II, 237) and in being supported by their enormous financial strength. So important are its real estate operations that a separate company has been organized therefor—the United Merchants Realty and Improvement Company —and financial aid when necessary is given this by other defendants (Whelan, R. III, 105, 106; Hill, R. II, 350, 351). For explanation of the inevitable results and the effect already on the retail trade, see evidence of Schulte (R. III, 462).

MAC ANDREWS & FORBES COMPANY—LICORICE MONOPOLY.

The purchases and combinations of interests through which the MacAndrews & Forbes Company secured control of 95 per cent. of manufacture, trade and commerce in licorice roots and products are specified in the petition and not substantially controverted (Pet., R. I, 61-65, *ante,* p. 103; see also Answer, R. I, 227, and Admissions, R. V, 19-20).

The explanation by defendant Duke for secretly organizing this business is enlightening (R. IV, 410). "There were two or three of these fellows [manufacturers of licorice] and they could have ruined us if they wanted to and we didn't let the people around the office know about it, only a few of them." The present ability of the Licorice Company to ruin a competitor of the American Tobacco Company certainly seems no less evident!

The company was incorporated (1902) in New Jersey, under direction of Continental Company, with broad powers, perpetual existence and share capital of $7,000,000—$3,000,000 common and $4,000,000 preferred, the latter without voting power (see Charter, Ex. 17, R. V, 63). The common and most preferred shares have been held by Continental Company or its successor (Jungbluth, R. III, 329, 330, 335). Shortly after incorporation, the MacAndrews & Forbes Company, J. S. Young Company, of Baltimore (secretly controled by the former—R. III, 342) and John D. Lewis, of Providence, R. I., the three principal producers of licorice products, under specific direction of

defendant Duke (R. III, 351) entered into an agreement to establish and maintain prices and advanced licorice paste from 7 1-2 to 10 cents per pound (Jungbluth, R. III, 344, 350; Exs. 26, 27, 28, R. V, 99, 103, 105). The corporations were indicted and convicted under the Sherman Act (Jungbluth, R. III, 350, 351). [A writ of error to this court was dismissed at the last term without hearing.]

MacAndrews & Forbes manufactures exceeding 95 per cent. of domestic licorice products (Jungbluth, R. III, 314) and imports a larger percentage of the raw material. About 82 per cent. is sold to the allied companies. It supplies 80 per cent. of the paste consumed in Canada—about one-half from factories in this country (Jungbluth, R. III, 315); produces from 75 to 80 per cent. of the world's output (Jungbluth, R. III, 318), and maintains factories in Asia Minor and Southern Russia (Jungbluth, R. III, 316, 318). Its foreign financial operations are conducted through the British-American Company (Jungbluth, R. III, 329) and The American loans it large sums—$5,000,000 to $6,000,000 annually (Jungbluth, R. III, 329). Six per cent. dividends on preferred stock have always been paid; since 1903, 15 per cent. on the common (Jungbluth, R. III, 309, 310); and assets have rapidly increased (see Ex. 60, R. V, 483). Its domestic output of paste for 1907 was 42,282,308 pounds (Jungbluth, R. III, 353). Instances of unfair trade methods are given later.

The origin and development of this world-wide monopoly is well explained by witness Jungbluth (R. III, 308); and he points out plainly how competitive buying

of a raw product tends to increase the price and the consequent reasons for eliminating all competitors (R. III, 373; see also Ans. American Tobacco Co., R. I, 228-9). The usual method of retiring experienced men from the business has been followed (R. III, 330).

Speaking of his instructions concerning combination with Young and Lewis, etc., witness Jungbluth said (R. III, 373, 374, 376, 391)—

> * * * (373) I also told him [Duke] that the licorice root collections could not be increased at all as long as we had competition in the root field. Then the competition or competitors were discussed, and Mr. Duke suggested that the best way to reach the aim of increasing our root supply would be to buy up the competition in this country, Young and Lewis, and in that way the arrangements made at that time with Young and Lewis were originated. * * *
>
> (374) Q. You mean obtain root at a lower price than those compeitors or an increased stock without increasing the price? A. At a lower price than could be obtained under competition, as I mentioned before, the production of licorice root being barely equal to the requirements of licorice paste as a product, any sort of competition would have a material effect on the cost of licorice root in a given section. * * *
>
> (376) Q. And what induces MacAndrews & Forbes to furnish this root to these other licorice paste manufacturers? A. The inducement is to keep their competition out of the root field. While our competitors on this side are comparatively small, even small requirements such as theirs would be quite sufficient to increase the price for licorice root in a given section, accord-

ing to use, how far the competition would drive it. * * *

(391) Q. What is the effect, Mr. Jungbluth, speaking generally, of course, from your knowledge of business where there are many competitors in the field seeking to buy the crude product necessary for manufacture, is the tendency to increase or decrease prices? A. The tendency is ordinarily to increase the price. * * *

Defendant Duke thus explains the occasion and purpose of the combination—the licorice interests. Referring to his conversation with the President of the Licorice Company concerning supplies of root he testified (R. IV, 411)—

* * * He said he was being troubled very much by Young who was having his root gathered by the same people that gathered root for MacAndrews & Forbes, and that he was bidding for one root and putting up the price and if he couldn't be stopped we might get the price of root doubled without getting any more root, and I forget whether he advised or I suggested that he should buy Young, and he did buy him, or bought an interest in his concern, and we agreed to get the root and supply Young with it; and I believe at the same time he said Lewis was buying consignments of root received here and that disturbed him, and I said, buy Lewis too. He didn't buy Lewis because Lewis had his licorice plant mixed up with his dyeing works, and I said buy his output then, and he did.

ENGLISH COMPANIES AND AGREEMENTS.

November, 1900, The American Tobacco Company determined to enlarge its trade in the United King-

dom, "although it is not the expectation of the Board that such venture will be immediately profitable" (Ex. 39, R. V, 208). To facilitate this, in September, 1901, for $5,347,000, it purchased Ogden's, Limited, a manufacturing company at Liverpool (Harris, R. II, 50). A fierce conflict followed with English makers; many of them with trade throughout the world combined in the Imperial Tobacco Company, incorporated in 1901, with 15,000,000 pounds sterling capital (afterwards 18,000,000); and this continued the fight (Ex. 29, R. V, 106; Harris, R. III, 430; Ans. Imperial Tob. Co., R. I, 174; Carlton, R. IV, 299). Each combination offered a large bonus to dealers (Ex. 39, R. V, 216); and the American suffered heavy losses (Ex. 39, R. V, 216, 217, 218). The Imperial during this time was and its predecessors had been engaged in importing tobacco products from England into the United States (Harris, II, 22, 24). September 27, 1902, the conflict was ended by contracts executed in London (Exs. 1, 2, 3, 4, R. I, 111-138); and the American Company received 2,700,000 pounds stock in the Imperial—three-fourths of which it subsequently sold at a material advance (R. II, 56, ~~76~~).

The Imperial maintains an agency in the United States which purchases in various States half of total leaf exported to Great Britain (Carlton, R. IV, 237; Harris, R. II, 50, 51; Commerce & Navigation of U. S., 1906, p. 749). A strong but unsuccessful effort has been made to establish the existence of real competition between it and the American companies.

Immediately after the agreements of September,

1902, prices of tobacco leaf suffered a violent decline, going below cost of production (the markets in the Carolinas open in August)—(Carlton, R. IV, 269, 301, 302). The American Company, as stockholder of the Imperial, claims the right to know its affairs (Harris, R. II, 17), and selects three directors (J. B. Duke is one). The companies do not compete in sales, and jointly own the British-American Company, a large consumer of leaf. The relations are not compatible with genuine competition, and its non-existence is plainly indicated by correspondence in the Record. On one occasion, *e. g.*, the Imperial Company complained of The American because forced to pay too high for certain leaf, and explanations were offered (Harris, R. III, 518, 520, 541, 542). The original letter from the Imperial was never produced, notwithstanding repeated demands (R. III, 676-679). Letters relating to information concerning intentions, agreed percentages of leaf purchases, etc., do not harmonize with the theory of genuine competition (Carlton, R. IV, 255, 256, 257, 258, 286). The inevitable result is indicated by arrangements under which The American Company has purchased Perique and Turkish tobaccos for the Imperial (Carlton, R. IV, 246, 247; Ex. 6, R. I, 144; Harris, R. II, 51, 52).

Probably nothing in writing specifically provides against competition in leaf purchases. That is not necessary and might produce unpleasant results; a nod is sufficient. The denials of witnesses who say fierce competition exists between companies, one of which holds stock control of the other, receives constant de-

tailed reports of its operation, and is in frequent intimate consultation with it, are not very persuasive.

Many results of the 1902 contracts have been shown. The Imperial will only sell in the United States to the American companies, and importations have decreased (Com. & Navig. of U. S., 1906, pp. 337, 338). It is denied the right to sell leaf, stems or tobacco extracts here or out of Great Britain and Ireland without consent of and accounting to British-American Tobacco Company for the profits (Hill, R. III, 140, 141; Harris, R. III, 446, 537, 538). Defendants manufacturing here cannot export without the consent of and accounting to British-American Company. Each has its own portion of the globe where no other may interfere (Harris, R. III, 438, 444, 446, 449, 566-568, 572-574).

Motive for the English agreements is well expressed in letter, August 6, 1902, from Harris, Vice-President American Company, to Cobb, another officer (R. III, 433, 434—

> I regret to tell you that the Imperial Co. has stolen a march on us in Shanghai by buying up the American Cigarette Co. of Shanghai right under our noses, in fact after Roberts and Fiske had entered into some kind of an agreement to purchase and the calling of meetings of the shareholders for that purpose; * * * I am more chagrined over this than anything that has occurred in years, for now instead of having to deal with a broken-down concern like the old company was we shall have an aggressive competitor right on the ground, who though not having any trade in China as yet will undoubt-

> edly pursue the same policy as in India, namely, to produce the cheapest kind of goods and sell them at the cheapest kind of prices thereby putting a very effective check on our progress with "Pin Head's" and Murai's goods. Right along with this comes the delay in Cuba in connection with the J. S. Murias concern and notwithstanding all our cabling up to the moment we have received nothing indicating that the contract has been signed, it had been put off from day to day without any satisfactory reasons, and ever since the Shanghai performance the possibility has dawned upon us of another coup being made by the Imperial Co. in Cuba. Their success would mean a great handicap to us in Great Britain particularly, for with the present flourishing condition of the J. S. Murias business there and an aggressive policy on the part of the Imperial Company *it would mean a severe check to our freedom in regulating prices on our Havana cigars.*

One reason for buying a competitor is likewise well explained by Harris (R. III, 448)—

> Usually there is present an incentive which seems to be absent in this case, namely, that the prices of a competitor though on a small output, placed somewhat below our prices, prove an insuperable obstacle to our lifting our prices to a legitimate basis on a tremendous output, so that what we save in eliminating the cost of fighting, and what is gained in the advancement of prices is a potent incentive towards making a deal.

January 13, 1905, Hill, Vice-President of The American, wrote the Imperial, called attention to the

contract of 1902, defining territory, complained of its violation "by sale by you in the United States of leaf tobacco, scrap tobacco and stem products of tobacco" and asked for an accounting (R. III, 140, 141).

December, 1906, Harris, Chairman of British-American Company, wrote agreeing that The American and Imperial should be excluded from "leaf dealings" therein and draw their supplies "from the new fields such as Africa, India, China, etc., through the British-American organization on the ground." (R. III, 531, 532.)

In October, 1907, Cunliffe Owen, of the British-American, wrote Harris regarding "an arrangement with the Imperial Tobacco Company by which we permitted them to export stems to our territory, on the understanding that they accounted to us for one-half the net proceeds" and also regarding the British-American Co.'s part of profit from foreign sales by Kentucky Tobacco Product Company (Harris, R. III, 537, 538). Whenever a subsidiary of The American Tobacco Company exports anything, the latter's proportion of profits must be paid to British-American Company (Harris, R. III, 566, 567); and if the Imperial Company sends stems from England it must likewise account (Harris, R. III, 572, 573).

The British-American Company consented to formation of companies for "export business" as defined in agreement of September, 1902, provided The American Company should report half yearly and pay over the profits. (Harris, R. III, 439, 440.)

In November, 1904, Harris, of The American Com-

pany, wrote the British-American Company giving it permission to operate in the Philippine Islands. (R. III, 441.)

The British-American and its subsidiaries, David Dunlop and T. C. Williams Co. (formerly the most important exporters of plug) make nearly all manufactured tobacco exported from the United States, and with subsidiary W. S. Mathews & Sons, send quantities of leaf abroad. (Harris, R. II, 46-49; Mathews, R. III, 171, 174; Harris, R. III, 418, 419, 420.) American leaf is used almost exclusively in England for tobacco products (Harris, R. II, 50). Likewise, for the output of British-American Tobacco Company everywhere (Harris, R. II, 32, 67), 50,000,000 pounds being purchased annually therefor by The American Company (Harris, R. II, 33, 34). Six million pounds goes to England (Harris, R. II, 50, 51) and is used for export trade once carried on by the Imperial and its predecessors. Before the contracts of 1902 this was purchased in competition with the American Company (Harris, R. II, 76-79).

Federal statutes authorize bonded factories for tax free tobacco intended for export. Reports from these are not made directly to the Internal Revenue Bureau and consequently are not included in the figures given in its annual reports, unless expressly so stated. The difference between products exported from bonded warehouses and tobacco made in ordinary factories and sent in bond to port of exportation must be noted. The British-American Company or its subsidiaries manufacture for export in bonded warehouses in North

Carolina and Virginia (Ex. 21, R. V, 77)—in 1907 1,805,117,150 cigarettes and 4,866,419 pounds of plug and twist (Ex. 84, R. V.).

Stems and dust of the British-American Company are sold to Kentucky Tobacco Product Co. (controlled by The American Company) (Harris, R. III, 416). In August, 1904, Harris wrote to the British-American Company—"It certainly is to the interest of all concerned to see that no competition is allowed to exist in the marketing of the finished product in the various countries abroad between the product of the English factories and those of the Kentucky Tobacco Product Company" (R. III, 439). In March, 1905, The American Company wrote the Imperial complaining of the latter for selling offal in the United States and pointing out its loss by reason of excessive prices paid by a subsidiary—"This fact illustrates the injurious results to us, and to companies in which we are interested, of your trading, as it appears to us, in violation of the contract of September 27, 1902." (R. III, 446).

THE MERGER OF 1904.

October, 1904, The American, Continental and Consolidated Companies were merged (see Ex. 7, R. I, 150-159). Defendant Duke says this was because of the decision in the Northern Securities case, and also because "we would have a more perfect and compact organization, and as both concerns were practically owned by the same interests I thought it was best to make one concern of it" (R. IV, 379, 429, 430). The common stock, with exclusive voting power, went to stockholders of the Consolidated Tobacco Company; and An-

thony N. Brady, James B. Duke, Oliver H. Payne, Thomas F. Ryan, William C. Whitney and Peter A. B. Widener (or their representatives) have continued in control of the combination (R. V, 390 *et seq.*).

COMMERCE IN LEAF TOBACCO.

For a long time leaf tobacco was sold by the farmer at the barn or through competing warehouses, and many independent bidders sought it (Smith, R. II, 157-160). After 1890 the number rapidly declined and The American Company and its subsidiaries became purchasers of more than half of the southern crop, with agents, under one general supervision, located in all important districts (Smith, R. II, 172-178; Ex. 76, R. V; Cobb, R. III, 1; Yuille, R. II, 89; Carlton, R. IV, 229, 299). The necessary result is undue power over prices.

Since the formation of the Imperial Company (in 1901) it has been the second largest buyer of American leaf and has maintained an agency with headquarters at Richmond. Through this it purchases in Kentucky, Maryland, Virginia and the Carolinas about 54,000,000 pounds annually; and in addition it buys an undisclosed amount of the cigar type (Carlton, R. IV, 237, 253, 259, 278) through a separate agent who comes to this country, and from dealers in England. When this company and the American were in real competition (1902) prices in the Carolinas and Virginia were very high (R. IV, 241, 242, 264, 265, 271) notwithstanding the large crop; when this ceased they fell below cost of production. The average for 1902 was not again reached

until 1907, notwithstanding the declining production (R. IV, 269).

The inevitable tendency of the agreement between the English and American combinations is that leaf for both will be purchased through one agency; already the American Company has bought for the Imperial Company Perique Tobacco in Louisiana (Carlton, R. IV, 277, 278) and leaf in Turkey (Ex. 6, R. I, 144). The record supports the conclusion that since 1902 these companies have worked harmoniously concerning leaf purchases as in other matters—Carlton's testimony and correspondence (R. IV, 229-304). All significant letters cannot be quoted in full, but passages from some follow.

Letter to Imperial Co. from its Agent in Richmond, December 23, 1902 (R. IV, 242, 243)—

> The markets are now all closed for the Christmas holidays and will not re-open until the 5th of January. Pending the arrival of your letter unless there is some very sufficient reason of which I am not aware, it would be a serious mistake to curtail our operations at this stage. The balance of the bright crop still to sell is comparatively small, and for the past few weeks prices have been going down steadily. The A. T. Co., in their anxiety at the early part of the season to prevent us getting supplies, seem to have overbought themselves, and are now practically off the market on all grades in which we are interested. Take, for instance, our "C. D." grade, for which prices were forced up as high as $13.00 per 100 pounds during the time of the fight, we are now buying as low as $8.00, and

expect to make a further reduction when the markets reopen.

As the crop now being sold is of very desirable quality, we are not only buying so much cheaper, but the standard of the grades is better.

If we withdrew from the market for the balance of the season, there are two dangers to be borne in mind. First: The speculators who conspired with the A. T. Co. against us during the early stages of the market and paid such enormous prices, even although their stocks may be in Great Britain unsold, would immediately secure further supplies at exceedingly low prices, and would thereby be enabled to average a lower cost for the whole season's shipments to Great Britain. Second: If we withdraw from the market now, the effect on the farmers, and, consequently, next year's crop might be most detrimental. * * * You must also bear in mind that the farmers are now watching closely the action of the Imperial and the A. T. Co. to the exclusion practically of all others, and if we were to drop out of the market now, it might have a very serious effect on next year's planting, as the farmers have started organizations all over the Bright belt to decide on their course for the ensuing year. * * * If we can insure a good planting next year, we think prices will be such as will make the average of the two years of a very reasonable nature. * * *

Letter from its American agent to Imperial, January 26, 1903 (R. IV, 244)—

Putting aside the possibility of the A. T. Co.'s position being a legal one, they would naturally have felt annoyed, and to have given them

the slightest ground for not working amicably regarding the leaf purchases for the future would, I think, have been a fatal mistake.

Letter from its American agent to Imperial, February 2, 1903 (R. IV, 248)—

> But for the action of the A. T. Co. probably prices would be slightly lower than they are on low grade semi's, but our friends seem to think they are as low as they should be, and possibly from their point of view they are right, bearing in mind the desirability of encouraging farmers to grow a big crop next year.

Letter from its American agent to Imperial, August 14, 1903 (R. V, 250)—

> The markets in South Carolina and Eastern North Carolina have been opened, and the primings, which are mean and sandy, have sold at exceedingly low prices. Our buyers have not touched them, and the feeling amongst farmers against the A. T. Co. is most bitter. We are just beginning to buy a few of our grades, and indications are that prices will be low and quality fairly good. The color seems to be better than was anticipated. * * *
>
> It is impossible to say whether present prices will continue during the season, but as speculators generally seem to be afraid to operate, it looks as if prices will be determined practically by A. T. Co. and ourselves. So far, A. T. Co. are acting most conservatively. * * *

Letter from American resident director of Imperial to its Secretary, Leaf Department, September 7, 1903 (R. IV, 252)—

> A few days ago Mr. Reed met Mr. R. M. C. Glenn, the head buyer of the American Cigar

> Co., when Mr. Glenn expressed a strong desire that any of our Branches requiring Wisconsin, York State, Connecticut, or any other States Cigar Seed Leaf, would place their orders with the American Cigar Co., giving full particulars and samples. He promised to supply them on same terms as their own Branches. They practically already control the trade, and expect our Branches will not support any independent shippers to their disadvantage. * * *

Letter from its American agent to Imperial, September 10, 1903 (R. IV, 254)—

> Both the A. T. Co. and ourselves, we think, ought to act for the present very conservatively, so as to ensure our being able to remain on the markets until the end of the season, because if one or other were to get their requirements filled up before the end of the season, the result on the market would be disastrous. Our hope is that both of us will be able to remain steadily on the market, and if it is thought towards the end of the season advisable to raise limits so as to encourage farmers for the ensuing season, this could be done. If, on the other hand, by any chance prices towards the end of the season were lowered, the effect on farmers would be distinctly prejudicial to next year's growing.

Letter from Imperial to its American agent, October 23, 1903 (R. IV, 255)—

> I gather from the rest of this article that The American Tobacco Company proposes to support its campaign in Germany by increasing the prices in the Clarkesville district, from which the Germans obtain a large part of their supplies.

> If this is so, I think the A. T. Co. should inform you of their intention, as it may be desirable for us, if a campaign is on foot in Clarksville similar to that in which they engaged last year in Virginia, to keep off that market, and obtain our supplies or part of our supplies on this market, which is at the moment depressed, but which once the news of the A. T. Co.'s action is known, would probably rise.

Letter from Imperial to head of leaf department American Tobacco Company, November 3, 1903 (R. IV, 256)—

> * * * Referring to our conversation regarding Wilson, beg to say that I have gone closely into this matter also since I came home and have instructed our Branch there to discontinue the purchase of our C. C. mark for the present. I think this mark is about the only one that conflicts with yours, but as a matter of fact, the purchase of this mark at Wilson last week were only 2,000 lbs. and total purchases of all our strip grades only 122,000 lbs. This, as you will see is considerably below 40 per cent. of the total sales, which is what we regard as our share of Wilson tobacco. I think had you been in Wilson yourself, you would have taken a different view of the state of affairs there, but we are anxious to avoid any possible friction and are quite willing to meet your views in this direction as nearly as we can. * * *

Defendants through various organizations—principally The American Tobacco Company, Imperial Tobacco Company, American Cigar Company, American Snuff Company and the R. J. Reynolds Tobacco Com-

pany—purchase more than half of all domestic leaf and of certain types more than three-fourths; likewise most of the tobacco grown in Porto Rico, and very largely in Cuba and Turkey (R. V, Ex. 76; Cobb, R. III, 17, 27, 41-42, 80).

The following is from the Year Book, Department of Agriculture (1908, p. 680)—

Year.	Acreage, Production, Value, etc., of Tobacco in the United States, 1900-1908.					Domestic exports of unmanufactured, fiscal year beginning July 1.	Imports of unmanufactured, fiscal year beginning July 1.
	Acreage.	Average yield per acre.	Production.	Average farm price per pound Dec. 1.	Farm value, Dec. 1.		
	Acres.	Pounds.	Pounds.	Cents.	Dollars.	Pounds.	Pounds.
1900.....	1,046,427	778.0	814,345,341	6.6	53,661,132	315,787,782	26,851,253
1901.....	1,039,199	788.0	818,953,373	7.1	58,283,108	301,007,365	29,428,837
1902.....	1,030,734	797.3	821,823,903	7.0	57,563,510	368,184,084	34,226,956
1903.....	1,037,735	786.3	815,972,425	6.8	55,514,627	311,971,831	31,162,636
1904.....	806,409	819.0	660,460,739	8.1	53,382,959	334,302,091	33,988,378
1905.....	776,112	815.6	633,033,719	8.5	53,519,068	312,227,202	41,125,970
1906.....	796,099	857.2	682,428,530	10.0	68,232,647	340,742,864	40,898,807
1907.....	820,800	850.5	698,126,000	10.2	71,411,000	330,819,658	35,005,131
1908.....	875,425	820.2	718,061,380	10.3	74,130,185	.....	.....

The acreage, production and value of tobacco for different States are shown in appendixes "C," "D," and "E," hereto.

The quantity of leaf used for manufacturing smoking and plug tobacco, snuff, cigars and cigarettes has rapidly and uniformly increased—the total for 1906 exceeded 1900 by one hundred million pounds (Rep., Com. Int. Rev., 1907, p. 126).

American leaf is used almost entirely in England for manufacturing (Harris, R. II, 50). The British-American Company exports from America to England annually six to eight million pounds of leaf and the Imperial Company some fifty-four millions (Harris, R. II, 51; Carlton, R. IV, 237).

Total leaf exports from the United States were—1902—291,369,700; 1903—357,496,342; 1904—305,382,128; 1905—328,232,009; 1906—302,333,075; 1907—331,548,309 (Com. & Nav. U. S., 1906, p. 750; *Id.* 1907, p. 766).

Export of leaf to countries named (Com. & Nav. U. S., 1906, p. 749; 1907, p. 766)—

	1902.	1903.	1904.	1905.	1906.	1907.
France	31,822,220	31,557,215	33,769,536	40,534,487	40,386,440	41,613,280
Italy	29,948,766	37,536,942	28,626,282	30,446,427	34,105,851	37,369,102
Spain	14,542,342	28,792,693	19,649,414	16,848,409	13,669,616	20,013,488
Japan	4,618,433	4,429,591	5,119,683	6,629,017	7,673,285	2,045,998
United Kingdom	98,727,979	125,135,143	89,372,148	101,782,477	97,967,160	116,438,714

Yuille (R. II, 95-99) points out the types of tobacco which are exported. They grow in Southern States and are mainly purchased by the Imperial Company, and agents of France, Italy and Spain—"Regie" countries, with tobacco monopolies.

Govt. Ex. 76 (R. V) is a statement of leaf purchased by The American Company and subsidiaries from crops of 1903-4-5, and estimates of total productions by Mr. Yuille, of its leaf department. It is admitted that their demands for 1906 leaf equaled 1905.

The table on the following page made up from Exhibit 76 (R. V) and Government publications (Appendix "C" hereto) shows purchases by the American Company and companies controlled by it. In addition to these the Imperial Tobacco Company purchases and exports to England annually 54,000,000 pounds.

Type.	Total purchases by A. T. Company and subsidiaries.	Total production in U. S. as estimated by Mr. Yuille.
1903 Crop.		
Flue cured Va., N. C. & S. C.	160,735,651	278,034,777
Dark Virginia	8,416,356	55,061,305
Va. Sun Cured	5,486,749	6,183,915
Burley	123,850,151	194,070,000
Green River	24,892,527	43,010,000
So. Ky. & Up. Cumberland	12,329,482	21,000,000
Dk. West. inc. Hend. Dist.	27,712,705	184,285,000
Seed Leaf	23,997,151	188,500,000
Seed Leaf Cuttings	3,402,702	.....
Maryland (Bot. from Dealers)	1,012,790	23,942,160
E. Ohio Air Cured & Fired	.....	4,278,750
Totals	391,836,264	998,365,907
(Government's Estimate		815,972,425)
1904 Crop.		
Flue Cured Va., N. C. & S. C.	107,707,751	190,813,490
Dark Virginia	12,369,827	57,288,004
Va. Sun Cured	6,833,551	7,298,689
Burley	127,265,494	194,070,000
Green River	12,911,423	33,330,000
So. Ky. & Up. Cumberland	7,573,903	15,000,000
Dk. West. inc. Hend. Dist.	28,671,087	138,920,000
Seed Leaf	22,851,997	178,500,000
Seed Leaf Cuttings	3,113,345	.....
Maryland (Bot. from Dealers)	335,428	22,900,000
E. Ohio Air Cured & Fired	.....	4,025,000
Totals	329,633,806	842,145,183
(Government's Estimate		660,460,739
1905 Crop.		
Flue Cured Va., N. C. & S. C.	120,895,040	204,515,976
Dark Virginia	15,372,291	54,436,589
Va. Sun Cured	7,437,199	8,140,669
Burley	175,095,096	240,830,000
Green River	18,228,711	30,470,000
So. Ky. & Up. Cumberland	9,897,208	21,000,000
Dk. West. inc. Hend. Dist.	34,908,336	146,500,000
Seed Leaf	31,080,663	190,000,000
Seed Leaf Cuttings	5,117,929	.....
Maryland (Bot. from Dealers)	397,339	20,316,120
E. Ohio Air Cured & Fired	.....	5,135,000
Totals	418,429,812	921,344,354
(Government's Estimate		633,033,719)

[Purchases by Imperial Co. are not included in above.]

Considering Mr. Yuille's excessive estimate, that demand is for types—one cannot be substituted for another—and that of the cigar or seed leaf (175,000,000 to 190,000,000 lbs. yearly) they purchase only 30,000,000, defendants' preponderating influence in

Southern markets is apparent. Enormous purchases gives them practical control of warehousemen (Dunkerson, R. IV, 96-98); and their power over the markets is further emphasized by the quantities they carry. The financial statements (Exs. 51, 51a, R. V, 441, 456) of The American Company for 1906 and 1907 show leaf on hand exceeding $25,000,000; the American Cigar Company at the end of 1906 had nearly $8,000,000; R. J. Reynolds Tobacco Company exceeding $3,500,000, etc. (Fin. Statem's, R. V, 470, 481).

Defendants claim real competition in purchasing leaf between The American Company and controlled concerns having separate buying organizations. But as all report to and take orders from the central organization and are at work to swell its receipts no genuine competition can exist. The buyers of the R. J. Reynolds Tobacco Company, which purchases 30,000,000 pounds per year, until this investigation sent daily to The American Company detailed reports of purchased leaf (R. II, 117). Rivalry between agents of the same master is not competition. Moreover these companies at different times have bought leaf for each other and for others and have received instructions concerning purchases (R. II, 601; R. III, 224, 227). The Snuff Company, a director of which is on the central leaf committee, has purchased millions for the French Government, The American Company and others; and has exported leaf (Christian, R. III, 224, 233). The R. J. Reynolds Company has done likewise. Of course some apparent competition must exist to affect the producer, but conditions preclude any that is effective—one

cannot compete with himself. The difference between a "bona fide" competitor and a simulated one was clear to Vice-President Harris when he wrote concerning the relations between the Snuff Company and W. S. Matthews & Sons (R. III, 444)—

> Be that as it may, it would be suicidal for the Matthews concern not to have the Snuff Co. interested in it, for without having a stock interest in it, it would be very risky to say the least of it for the Snuff Co. to do any purchasing for what is virtually a competitor on the leaf markets. You may have read of the inquiries now being made in the State of Tennessee by directions from Washington into the existing methods of buying leaf tobacco, and we are rather expecting daily that the Snuff Co., the Matthews Co. and others will be called upon to disclose our relationships and buying arrangements. It goes without saying that one of the strong points in defending the Snuff Company purchases for Matthews will be the fact that they have a stock interest in the Matthews concern. Furthermore, I would not like to predict what would happen to the Matthews profits if they should have the Snuff Co. as a bona fide competitor for leaf.

(See also, Dula, R. II, 573, 601; Hill, R. II, 333; Coan, R. III, 624, 625.)

GROWTH OF DEFENDANTS—WHAT THEY CONTROL—MANUFACTURED OUTPUT AND BRANDS.

"At the time of the formation of the original American Tobacco Company in 1890 it issued $25,000,000 of capital stock. The tangible assets acquired from the concerns joining the Combination amounted to only $3,545,108.02. The difference between the capitaliza-

tion and the tangible assets, $21,454,891.98, was written down on the books as good will. The company also had, however, $1,825,353.74 of notes given by individuals entering the Combination and subsequently paid up. The amount of these notes was treated as a surplus and not balanced by the capital stock. It is entirely evident that, although under competitive conditions, the concerns that entered the Combination may have had a considerable amount of actual brand value, or good will, it could not have exceeded a comparatively small fraction of the value assigned to it on the books of the Combination. The reason why the American Tobacco Company in its early years was able to earn liberal dividends on its entire capitalization lay in its monopoly power. At the outset the Combination controlled substantially 97 per cent. of the cirgarette business, and it for several years was able to guarantee its position of approximate monopoly by securing a control of all the principal patented cigarette machines." (Report of Bureau of Corporations to Senate, June 5, 1909, p. 24.)

The combined assets of the American Company and its subsidiaries (statements 1907), including the Imperial, now exceeds $400,000,000, all used for one end; and all, except the Imperial's, under the absolute control of six or eight men who hold $20,150,000—a majority of The American Company's common stock. Sixty subsidiary companies are defendants—many others operate in this country and abroad.

When The American Company began (1890), its annual consumption of leaf was under 15,000,000

pounds (Admissions, R. V, 4). The purchases of the allies (including the Imperial) for 1903, 1904 and 1905, respectively, were approximately 441,000,000, 375,000,000 and 468,000,000 pounds (Ex. 76, R. V).

The record does not show the amount of Cuban and Porto Rican leaf consumed, but it is large.

The output of The American Company for 1890 was 5,466,619 pounds smoking tobacco and 2,453,458,000 cigarettes (Exs. 77 & 78, R. V). The domestic production of manufactured tobacco by it and its subsidiaries (including the British-American) for 1907 was—cigarettes, 5,730,623,850 (Exs. 77 & 84, R. V); smoking tobacco, 127,638,531 pounds (Ex. 78, R. V); plug and twist, 142,074,302 pounds (Exs. 79 & 84, R. V); fine cut, 10,115,315 pounds (Ex. 80, R. V); little cigars, 954,001,460 (Ex. 81, R. V); snuff, 22,067,234 pounds (Ex. 82, R. V); cigars, cheroots and stogies, 1,039,822,996 (Ex. 83, R. V).

The increasing output of domestic tobacco products made by defendants appears in Gov. Exhibits 77 to 83 (R. V). These are summarized in Appendixes "F" to "M" hereto.

The companies operating in Porto Rico in 1907 produced—cigarettes 362,486,495; cigars 63,671,162; plug 13,775 lbs. (Ex. 85, R. V); those in Cuba in 1907—cigarettes 2,084,167,480; cigars 96,308,255 (Ex. 86, R. V).

The output of the Imperial Company and of the British-American Tobacco Company in foreign countries was not disclosed, but they used therefor about 75,000,000 pounds American Leaf.

In addition to tobacco products, subsidiaries of The American Company produced in 1907—40,000,000 pounds licorice paste (R. III, 313, 314); 16,500,000 pounds tin foil (R. III, 157); 450,000,000 cloth containers (R. III, 584); vast quantities of insecticides, fertilizers, etc. (Kentucky Tobacco Products Co.); boxes (Mengel Box Co.); pipes (Manhattan Briar Pipe Co.); and they were also engaged in insurance, sign painting, planting, jobbing, retailing and purchasing supplies.

The Answer says "the creation of a profitable tobacco business depends in the first place on hitting, by luck or skill, upon a process of manufacture, packing and labeling that will please a great number of consumers; in the second place bringing this product favorably to the attention of a great many consumers; and in the third place, maintaining the quality and characteristics of this product. * * *

It has been, and, so far as these defendants believe, always will be, a matter of expense to establish a brand of tobacco of a substantial value, even after the manufacturer has obtained a product which when properly brought to the attention of consumers will be popular. This expense may be incurred in various ways; sometimes expensive advertising is done; sometimes the extensive giving away of samples is resorted to" (R. I, 257, 258, 259).

The tobacco business is largely a "matter of brands" and the more one controls the greater his power to crush opposition and prevent new ventures. To show the great number of brands, covering every grade and price of tobacco products which defendants

manufacture, their catalogues or price lists were introduced (see Exs. 64 and 65, R. V, 489-505). There are hundreds of them—of plug chewing alone more than one hundred and fifty.

The popularity of a brand and its consequent importance to dealers is indicated by amount sold; and Exhibits 62 and 63 (R. V, 488) indicate the enormous sales of some which defendants control and their origin. Sales of plug brands "Star" and "Horseshoe" during 1907 were, respectively, 27,322,478 and 19,211,575 pounds; of smoking brands, "Duke's Mixture" and "Bull Durham"—13,784,476 and 11,824,696 pounds.

The dependence of dealers upon defendants and their popular "brands" is forcefully brought out in the cross-examinations of jobbers called by them (R. IV, 464, 473, 529, 544, 610, 620, 622, 630, 640, 703, 709). Also the effective way in which relationship with "secret companies" was concealed and utilized. (See, also, Matthews, R. IV, 189.)

There are some successful manufacturers who have brands, established before defendants became so powerful. To destroy these would be expensive and apparently the better plan is to await events. Block Brothers (R. IV, 550) have a brand 30 years old; Christian Peper, at St. Louis, is an old concern (R. IV, 644); and the same is true of most of those mentioned as competitors in the Answer of The American Company (R. I, 262) who are prospering. Scotten-Dillon is exceptional and within a dozen years has built up a large business; but as shown elsewhere, defendants

have sought its stock, have succeeded in getting some, and there is no foretelling how soon it too may come under dominion.

The position of an old well-established concern is well pointed out by Dula in letter to Patterson, May 26, 1903—

> * * * I also think it important that you should open up negotiations for the purchase of Dill without delay, for I do not believe that anything you might do in the way of fighting his brand on a reasonable basis would have any discernible effect on his output for months to come. It is one of the oldest brands in the country, and its trade is scattered among a class of consumers who are slow to change. The only way to get his business, in my opinion, is to buy it. * * *

NO COMPETITION AMONG PARTIES TO COMBINATION.

The power of The American Company over subsidiaries is not controverted; but it is claimed that except when treated as branches they are managed by minority stockholders and compete vigorously with each other and the common owner. Such a position needs little discussion. This from the answer illustrates defendants' idea of competition (R. I, 220)—

> *The competition between the American Tobacco Company and various other tobacco manufacturing companies is the same whether the American Tobacco Company owns all the stock, a part of the stock, or none of the stock at all,* for these various corporations, except those like Blackwell's Durham Tobacco Company, which

are in fact only branches of the American Tobacco Company, conducted as separate corporations only for trade method or trade-mark purposes, have their own leaf-buying plants and their own selling organizations, and it would serve no profitable purpose to anyone, but would be destructive of the tobacco business, to attempt to eliminate or lessen competition. *In truth, the competition between different similar brands of tobacco owned by the same manufacturer is just the same as if there were not such common ownership.*

Defendant Duke testified (R. IV, 394)—

Q. Were any of these acquisitions made in order to thereby get rid of the competition of the concern?

A. No, sir, because we continued to be in competition.

Q. Were any of these acquisitions or majority stock interests acquired with the purpose of using the company against other competitors?

A. No; they were acquired with the idea that we would build up a lot of other organizations. Our crowd had about all they could handle and we concluded that the best way would be if we went into things in that way, was to let them continue an interest in it and they would manage it.

Q. You mean the previous owners would continue the management of it and continue an interest in it?

A. Yes, sir; we wanted them to push and drive hard against us. If they could take our trade let them have it; we didn't care, or at least I didn't. The manager of a department, he

> cared; it made him work hard to keep them from getting his trade.

And this by Harris, Vice-President, relative to Australian matters, is enlightening (R. III, 533)—

> Our idea is that our Australian friends should arrange matters so as to have *some show of a friendly competition,* which would be the means of establishing a healthier condition of affairs amongst themselves, by each company being imbued with a certain amount of rivalry, while on the other hand it would give the customers an opportunity of buying wherever they chose which we all know would be much more palatable than, as they put it, be forced to buy from one concern as now.

Subsidiaries report in detail, directly or indirectly, to The American Company and take directions from it (Schroeder, R. IV, 195-202, 209-212; Hill, R. II, 200, 211, 219, 220, 274, 276, 288, 312, 314, 388, 430; Dula, R. II, 471, 472, 474, 476, 488, 528, 542, 651); its officers and directors are upon their Boards; correspondence and conferences continually take place amongst them; they are loaned large sums of money (R. III, 93); some have been directly subsidized; it claims the right to know all concerning a company whose stock it holds (Harris, R. II, 17); and it constantly dictates policy, methods and prices (Dula, R. II, 505, 507, 512, 522, 542, 571, 574-575 *et seq.*).

The affairs of subordinates are conducted in many ways; some have separate buying and selling organizations and transact in their own names under the immediate direction of minority stockholders; others are

treated as branches, and their supplies bought and output sold for them (Duke, R. IV, 393-395; Hill, R. II, 212 *et seq.*); but the great purpose of all is to earn money for the American. Defendant Duke, the autocrat of the combination, summed up the situation well when he said—"To the man that is going to run the business I say here go ahead and run it any way you like so you make profits, that is all I care" (R. IV, 395).

A few extracts from scores of letters will sufficiently indicate the real situation—

Vice-President Hill wrote Irby, agent at New Orleans, on December 24, 1902, concerning two subsidiaries there (R. II, 256)—

> You are no doubt familiar with the agreement made between the Southern, and the Louisiana Tobacco companies as to prices. This agreement has been submitted to our counsel, who tells us it is entirely illegal. I wish therefore you would see that said agreement shall be destroyed, and in your presence, by both of these parties. The arrangements they have made can be continued according to the agreement, but no written agreement is necessary. The fact that we wish them to carry out the spirit of this proposition should be sufficient to keep both of these parties in line.

Hill to the Penn Company (a subordinate just acquired), Sept. 24, 1903—(R. II, 272)—

> * * * * All of our work had been discontinued on Pick Leaf and instructions have been given to-day to discontinue giving gratis on this brand. All of the Blackwell's Durham in competition with your brand has been discon-

tinued. I note your letter from Columbia, South Carolina, which I return herewith. I find this point was omitted in giving instructions as to the sampling of Durham and our representative has been wired to-day to stop it at once. Do not hesitate to call my attention at any time to any localities where work is being done which in any way hampers you.

In May, 1903, George D. Bow, Vice-President of Nall & Williams Company (a secret concern) wrote Dula (R. II, 524)—

> * * * * * Our mission as we understand it is to get what you do not already possess, and if you do not penalize us with overweight by making us change this brand [Arrowhead] there will be nothing left but yourselves and your-ourselves in the Northwest within the next year. Spear Head is so firmly rooted that we cannot disturb it, but we will so thoroughly clean the board that Claw Hammer will have no nails to pull or Strong Hold no doors to lock. So far as establishing a precedent for the New Comer to follow, *I believe that there will be no more newcomers except of your own creation,* and I cannot help believing that the Continental Tobacco Co. is of the same opinion. To change this tag now and add this hardship to the ones already imposed will make a very much more difficult path for us and really retard us more than *those whose scalp we hope to take.* * * *

Hill wrote Heyneman, agent at San Francisco, September, 1903 (R. II, 274)—"We want to avoid all useless expenditure of money in competing with our own propositions." And to Carter, of Wells-Whitehead

Tobacco Company, Wilson, N. C., in August, 1905 (R. II, 338)—"We do not want to get into that fashion, practically competing with each other."

Dula, Vice-President, in July, 1903 (R. II, 538, 539), wrote Middleton, of Nall & Williams, to change arrangements in New England because "we practically control the business."

Hill to Woodhouse, wholesaler at Detroit, secretly receiving salary (August 30, 1904)—(R. II, 322)—

> It is reported here that in distributing cigarettes, you are filling orders for the Universal Line as well as Surbrug's goods.
>
> Some of our other jobbers of Turkish cigarettes in Detroit decline these orders and are not filling them, feeling that this is due to the Anargyros Company. I think it will be well, if you can see your way clear to take the same position.

And in July, 1903, Hill wrote to Dulaney, President of Reynolds Tobacco Company, Bristol, Tenn. (a subsidiary)—(R. III, 135, 136)—

> We hear that your men are doing some active work in Knoxville and vicinity. Our attention has been called to their work by our men who want to work on Duke's Mixture.
>
> We do not understand that there are any brands which have any sale in that locality other than Duke's Mixture and May Queen, and if that is correct, it is not desirable that either of us should go to any expense in that respect.

Craft, of the Craft Tobacco Company (subsidiary) at New Orleans, wrote Hill (R. II, 643)—

> My whole idea for the present is to get a certain class who are not using your goods. *I*

make no effort whatever where I find your goods selling.

(See also R. II, 274, 275, 338.)

Dula wrote Hamilton of the secret Bland Company October 12th, 1903—

> Our retail salesmen are required to give us information each day regarding the movements of our competitors in section of the country worked by you. I will compile and furnish you from time to time such information as relates to Central Union and other products of competitive manufacture whose trade is seemingly influenced by the use of the blue label. * * *

POWER TO CONTROL THE TRADE—INSTANCES OF ITS EXERCISE—EVIL INTENT.

The enormous power of defendants in combination is the inevitable result of admitted conditions, but evidence concerning some instances of its exercise was introduced.

Excluding cigars, they manufacture and distribute more than seventy-five per cent. of all tobacco products consumed in the United States, including most of the popular brands, essential to a successful business; wholesalers and retailers are consequently dependent upon them for indispensable supplies which must be sold on close margin (R. IV, 466). They may select their customers, determine prices, and by allowing greater or less discounts can make or cripple the merchants—they are of much greater importance to him than all others combined. They also through representatives everywhere keep close watch on all brands,

prices, etc. (R. II, 284). The result is that dealers are subservient, anxious to win favor and larger discounts —a hope shrewdly held out to those who will do as bidden. Vice-president Hill (R. IV, 698) calls these specials "confidential allowances" and says "The trade generally believes such allowances are given, but the names of the jobbers who receive allowances are confidential, and not expected to be known to any one except the jobber getting it." To be cut off by defendants would probably mean ruin to a dealer's tobacco jobbing department and often highly deleterious to others. For the 250 jobbers specially favored with an extra discount of 2 to 5 per cent. for doing "good work," see R. III, 96, and also R. II, 282, 423. When independent wholesalers do not yield, corporations are organized or secured and these do the things desired (Ans. A. T. Co., R. I, 257).

The ability of wholesalers to further sales clearly appears (R. IV, 550, 703); and the ways in which they can obstruct was no mystery to Hill when he wrote directing the action to be taken by one of his 3 per cent. "confidential allowance" jobbers in reference to a competitor's goods—"You should see to it that Mr. Deiches puts these goods up in the loft and does not sell them" (R. II, 136).

Wholesale grocers and tobacconists from many sections were called by defendants; 75 per cent. or more of their tobacco sales (except cigars) was defendants' goods; and most of them received a "confidential allowance" (R. IV, 460, 469, 526, 542, 559 and others). These discounts are tremendously effective, causing re-

cipients to work for defendants and neglect others; and they have also been used to prevent the handling of independent goods. Merchants are indisposed to take up independent brands, being in constant fear that the Trust will buy them and their labor will be lost (Hillman, R. III, 484).

July 8, 1903, Hill, Vice-President, wrote to an agent concerning cigarettes made by Butler-Butler Co., then a competitor, but since taken over (R. III, 133)—

> Mr. I. T. Stewart, Rochester, N. Y. Dear Sir.—We understand that 15,000 Sovereign cigarettes and 5,000 St. Ledger's were shipped to MM. H. L. Conway & Bro., Rochester, N. Y., yesterday, July 7th.
>
> For several reasons we would like to ascertain if this information is correct. I will advise you from time to time as to the different individuals who are receiving these goods in order that you may take such action with reference to our allotment as may cause a discontinuance of the purchase of these goods. It is most important that this matter shall be watched closely and that we receive prompt replies to the memorandums we will send you. This is the first and I expect to send them daily hereafter.
>
> Please regard this letter as strictly confidential and RETURN IT to me. On no account let any one else know you are receiving this information.

July 11, 1903, Hill to Curlett, agent at Baltimore (R. III, 136)—

> Following the information contained in my letter to you of July 8th. On July 8th there was shipped to J. Josty, Jr., 15,000 Sovereign little

> cigars, 10,000 cigarettes. Wm. Deiches & Co., 15,000 little cigars. You should see to it that Mr. Deiches puts these goods up in the loft and does not sell them. F. A. Davis & Son, 10,000 cigarettes. We did not understand that Mr. Davis was to sell any cigarettes; only little cigars. * * *

Others of the same kind are in the record (see Hill, R. III, 134, 135, 136, 138); they indicate constant spying to ascertain rivals' customers and shipments, and unfair use of power to destroy them.

Hill wrote to O'Sullivan, of Milwaukee, October 14, 1904 (R. II, 326), saying—"Sometimes we are able to secure from a friendly Internal Revenue officer monthly the stamp purchases of a particular factory. Perhaps Mr. Leidersdorf can have this gotten for you." Also to Gerow, a "tool" at Detroit, Mich., April 11, 1904 (R. II, 601)—

> If it is possible for you to do so, I would like you to ascertain and furnish me with the number of pounds of burley leaf held by other Detroit factories. I would also like to know the average price per pound of such stock, but do not wish to handicap you with this latter item in getting the information, as the most important thing I desire to know is the stock of burley leaf held by other companies. Kindly advise me by return mail what the prospects are for your furnishing me this information.

In 1904, by an extra discount to those handling their goods exclusively, the American and Continental companies caused substantially all established jobbers in New England to throw out independent products (Har-

rington, R. IV, 212-228). For this an agent was indicted in Massachusetts and convicted. The appeal to this Court was dismissed without a hearing. The record here is Ex. 40 (R. V, 248).

A like offer of an extra 3 per cent. discount in June, 1904, induced the jobbers in Philadelphia (67 of the 69) to throw out and refuse to handle independent products (Fowler, R. IV, 320-329). The American Company took up and paid for the goods thrown out (R. II, 249-250).

Jobbers have likewise been controlled through secret salaries and loans (Hill, R. II, 353-355; Dula, R. III, 145-146; Eckstein, R. IV, 538).

In New York City prior to 1899 there were many independent competing tobacco jobbers—at least 125. The American Tobacco Company then encouraged the organization of Metropolitan Tobacco Company and gave it (subject to revocation at will) an exclusive agency (R. III, 256 *et seq.*). The result has been the destruction of independent jobbing and the business there is now monopolized by the Metropolitan Company. Only two jobbers remain who sell as much as $100,000 per year—the largest is $325,000—while the annual sales of the Metropolitan Company have grown to $13,000,000 and there is now no chance to enter the business in opposition to it (Bendheim, R. III, 255-278; Hillman, R. III, 479, 482, 483, 485, 602; Schulte, R. III, 462-467).

UNFAIR AND OPPRESSIVE METHODS—DURESS AND MALICIOUS INTENT—SECRET COMPANIES.

Prior to 1902, the Standard Snuff Company at Nashville, Tennessee, competed with the American Snuff Company. To defeat this, the latter long practiced unfair and oppressive trade methods and the former sued for damages—the record is Ex. 41 (R. V, 307-341). Thereupon the American Snuff Company secretly bought a majority of the Standard stock and operated it under the guise of an independent (Scott, R. IV, 145-165; of course the suit was dismissed.

The Byfield Snuff Company, of Massachusetts, perhaps the most important surviving independent snuff company, has a small business (160,000 lbs. annually) in New England, and its principal brand is "Red Top." With intent to destroy this, the American Company in 1904 began and has continued to sell in that territory alone a similar brand at prices far below cost and at a material loss (Choate, R. IV, 304-320; Smith, R. III, 189).

The most profitable business of R. P. Richardson, Jr., & Co., of North Carolina (manufacturers of smoking tobacco) was in Mississippi, where it held a leading position. In 1903, with purpose of destroying this, the American Tobacco Company began aggressively to sell in that State below cost and the Richardson Company was put in well grounded fear of swift destruction (Stone, R. III, 656-676). At an opportune moment an officer of The American Company approached the stockholders suggesting an arrangement and this resulted in a contract for control by the Amer-

ican Company (Ex. 8, R. V, 21; Richardson Answer, R. I, 265-271). The original owners, charging fraud, are now seeking to annul the arrangement.

For years prior to 1905, the Nashville Tobacco Works, with plant at Nashville, Tennessee, did a profitable business, manufacturing and distributing plug in contiguous territory. The American Company instituted a ferocious attack on its leading brand and the owners became convinced that they must either sell out to it or be destroyed. Accordingly, in April, 1906, they secretly sold and until this suit was brought the company ran under the mask of independence (Puryear, R. IV, 165-181; Dula, R. III, 146, 147). The following from Dula, Vice-President, to Nall & Williams, of Louisville, a secretly owned "commercial wolf," discloses the scheme (R. II, 545)—

> This letter is in regard to the situation around Nashville, Tennessee, and the business of the Nashville Tobacco Works. I do not know how familiar you are with that situation, and desiring to acquaint you with everything I know in regard to it I will take the chance of telling you all I know, even though it may not be news to you. We began a campaign some six months ago on a brand made by Butler & Bosher, Richmond, called "Bull's Head," against the brand "Old Statesman," made by the Nashville Tobacco Works. "Bull's Head" has become very popular in a short length of time and in many places throughout Tennessee has practically knocked "Old Statesman" out. Our salesmen have been after me for some time to get out another brand to go against "Nashville Green-

ville," but fearing that it might interfere with the work being done on "Bull's Head," I refused to do it.

Our salesmen contend, and I think the contion is well founded, that while "Bull's Head" is cutting into "Old Statesman," the Nashville Tobacco Works' business is holding up as a whole owing to the increase they are making in the output of "Nashville Greenville." My desire is that you should take up the campaign against "Nashville Greenville," and in order to give you the benefit of anything that we might have I requested my brother to send you the formula for making "Bull's Head," that you might if you deemed it advisable use this formula to run against "Nashville Greenville." "Bull's Head" is made entirely of burley, and I am of the opinion that "Old Statesman" is practically of burley. I further believe that "Nashville Greenville" is made of the throwouts from "Old Statesman." You will remember some time ago I talked to you in regard to getting out a brand of mild "Greenville," and the success of this "Nashville Greenville" convinces me that the idea is correct. I want you to understand that I am not attempting to tell you how this piece of tobacco should be made, but if you can use the information given, all well and good. I am willing to trust to you to get out a piece that will do the trick, but I would like for you to get it out as soon as you can and enter upon a vigorous campaign to be kept up until the desired end is accomplished. I think you should use name lists freely in the introduction of your brand, as it is the quickest method I know of getting the tobacco in the mouth of the consumer. We are all

very much pleased with your business and the profits you are making, but it is very important that this campaign should be made even though your profits in making it do not show up very well. Your experience will probably be that if you are successful in getting out a piece of goods that will take from "Nashville Greenville" the same piece can also be used in competition with Strater, Martin and others.

About 1905, the Superintendent of the Conley Foil Company was prosecuted and convicted for attempting to bribe an employee of Lehmaier, Schwartz & Co., its only competitor in New York City, to give information concerning the latter's business (Conley, R. III, 303, 304).

General objection to trusts and combines hindered sales of products known to be produced by defendants.

The Tobacco Workers' Union has long refused to permit The American Tobacco Company or known subsidiaries to use its label—the Blue Label—which is supposed to facilitate sales, especially where there are many members of the Unions (Pinkerton, R. IV, 21-24; Hill, R. II, 271, 276, 283, 507, 572, 624, etc).

Bushwhacking methods against an opponent are iniquitous in trade as well as war and are inhibited by a civilized conscience. Nevertheless they have been constantly resorted to by the defendants.

Corporations manufacturing and trading in tobacco, secretly acquired, controlled and operated in the livery of honest independents, were the instruments adopted and long used by defendants to overreach the "Union," deceive the public and dispose of competitors (Fischer,

R. IV, 133-137; McAndrews, R. IV, 111-119). How many others were engaged in this nefarious business can only be surmised—twenty, whose names follow, were exposed by the proof—

Nall & Williams Tobacco Company, Louisville, Ky. (plug).

R. A. Patterson Tobacco Co., Richmond, Va. (smoking and plug).

Bland Tobacco Co., Petersburg, Va. (plug).

B. Leidersdorf Co., Milwaukee, Wis.

F. R. Penn Tobacco Co., Reidsville, N. C. (plug and smoking).

Queen City Tobacco Company, Cincinnati, O. (scrap).

Day and Night Tobacco Co., Cincinnati, O. (scrap).

Craft Tobacco Company, New Orleans, La. (cigarettes).

Michigan Tobacco Company, Detroit, Mich.

Pinkerton Tobacco Company, Zanesville, O. (scrap).

Wells-Whitehead Tobacco Co., Wilson, N. C. (cigarettes).

H. N. Martin Tobacco Co., Louisville, Ky. (plug).

Reynolds Tobacco Co., Bristol, Tenn. (smoking).

Manufacturers' Tobacco Co., Louisville, Ky. (plug and smoking).

D. H. Spencer & Sons, Martinsville, Va.

Lipfert-Scales Company, Winston, N. C. (plug).

J. S. Young Company, Baltimore, Md. (licorice).

Johnston Tin Foil & Metal Co., St. Louis, Mo. (tinfoil).

United Cigar Stores Company.

Standard Snuff Company, Nashville, Tenn. (snuff).

Nashville Tobacco Works, Nashville, Tenn. (plug and smoking).

In Smiley *v.* Kansas (196 U. S., 447) this court very plainly pointed out the obnoxiousness of secrecy, and there seems a want of harmony between its conclusions and the suggestion of the presiding judge below that secret ownership is a matter of no concern (R. I, 294).

The record contains much evidence and a vast deal of correspondence concerning the operations of these "bushwhacking" companies, which disclose amazing depravity and shows with clearness how these sinister agencies were effectively utilized. They were often subsidized by direct payment of two cents per pound of output in order to prevent personal loss to stockholders conducting the clandestine work; and some heavy losses were sustained (R. II, 328, 329, 349, 500, 543, 599, 603, 743; IV, 58). Correspondence was carried on in fictitious names; and unusual addresses were used. Vice-President Dula, *e. g.*, was "D. C. Williams, P. O. Box 70, Madison Square, New York City" (R. II, 524, 526); and Craft "Mrs. Elvina Gustine, Box 1255, No. O, 'Personal,' New Orleans" (R. II, 640). Blank paper and envelopes added to the mystery (R. II, 290; R. III, 300).

September 9, 1903, Hill, Vice-President, writing to Heynemann, his confidential man at San Francisco, about a secret concern just acquired, said (R. II, 271)—

> We have completed arrangements with the Gold Crumb people and it will not now be neces-

sary for us to take any action relative to their product. This is a very confidential proposition and we desire to have it run along without any information or suspicion that we are connected with it in any way. This is absolutely necessary on account of the Union label as you will readily understand. * * *

Dula wrote Nall & Williams (a particularly vicious concern) March 11, 1903 (R. II, 507)—

Samples of Arrow Head referred to in your favor of the 8th instant, came to hand this morning. I have examined them very carefully and am much pleased both with the appearance and the chew. The filler and sweet certainly both show up well. It is a tough, pleasant chew and if the people really want a good piece of Anti-Trust, Union Made tobacco, I certainly think you have it. I think you should direct your efforts particularly in the territories where the Detroit and other Louisville manufacturers have some business. A 3x12 five space piece as good as Arrow Head should knock Martin's Navy in St. Louis into a cocked hat.

* * * * * * *

From Dula to Nall & Williams, July 6, 1903 (R. II, 528)—

* * * As regards profits, while I would like you to show as much as possible, my idea is that you should not make money at the expense of trade, providing, of course, that you are getting this business from certain people. * * *

Same (R. II, 542) Oct. 12th, 1903—

Mr. E. S. Edwards has returned from a little trip in the Southwest and reports a growing de-

mand for Union label goods in certain large coal companies near Fort Smith, Ark. I think it would be well for you to offer to sell direct to Jenny Lind Coal Company and the Bonanza Coal Company, whose purchasing point is either in or near Fort Smith. Your Arkansas man will very likely know where to reach them. I am informed that there are several other coal companies right in this section whose consumers are demanding Union made goods which trade is now going to Strater Brothers. You can probably get all of their business by selling them direct.

Nall & Williams to Dula, February 12, 1904 (R. II, 551)—

> * * * There is a demand for independent goods, and if we do not get it some other independent concern, in my judgment, will.

July, 1903, Nall & Williams wrote Dula, addressed as "D. C. Williams" (R. II, 539)—

> I do not believe for the present that we should attempt to make any money out of this business. I think we should first get it on a solid foundation, and if we hold our prices down to where there is little or no profit, it will make some of our friends very sick. They are not in business for the love of it, and it doesn't matter where you set your price, if we keep ours low, in my judgment, they will be like the fellow between the Devil and the deep blue sea, afraid to go up for fear we will get the business, and to meet our prices would mean a loss. This in my judgment will make them very unhappy. * * * I sometimes find myself in an awkward position—

I am bound to strike, and sometimes I hit where I do not want to, but this cannot be helped, and I believe you realize this.

July, 1903, Dula wrote Middleton, of Nall & Williams, concerning "Gorman," a brand of the Manufacturers Tobacco Company at Louisville (then independent but subsequently acquired and closed)—(R. II, 539)—

In regard to Long Cut Tobacco, I think it is a splendid suggestion you make, that you get out a brand similar to 'Gorman.' If he decides within a few days to trade with you, there can be no harm done in having this brand ready, and in the event that he does not show an inclination to trade, you can probably pound him so hard that he will be willing a little later on.

April, 1905, Middleton wrote Dula concerning attempts to destroy competitors (R. II, 657-650)—

We are working our Cap Greenville around Paducah, Henderson, Glasgow and Bowling Green. The man that I have in that field was in Saturday, I questioned him regarding the Nashville Greenville in that locality and requested him to send me a sample of same, which I will get this week. He reports the Nashville Greenville doing well in that section, but hurting Strater's 'Cup' more than anything else; in a great many places displacing 'Cup.' This I think a good thing for us, as Strater has held the trade from what I understand in that section pretty solid. Now if the Nashville Greenville can knock out 'Cup,' then there is a chance for us to get back at Nashville Greenville, and probably get some of their business. As I understand it

they are selling Nashville Greenville at no profit, our man informed me that it cost the retailer, with their schemes, about 26 cents, well, this means that there is no money in it, and I imagine the Nashville Tobacco Works, if they can displace 'Cup,' after a little, will want to make some profit, then it seems to me will be our chance to step in.

Now regarding my making an active campaign in that field at this time, I hardly think it advisable, as I have about all the fights on my hands at present that I can take care of right, and if I get into too many scraps of this character, it will find us where I don't want to be, and where I don't believe you want me to get, that is, on the wrong side of the ledger. You remember, in our last conversation it was agreed that I should make an active campaign in the State of Ohio, which I am now doing and losing money in that fight. * * * I think if the fight is kept up in that field, we will put 'Index' out of business, just as we did in Indiana. * * * Now my idea is we started after Strater, and I think we have got him on the go, now let us attend to his case first. When we have run him to cover, then I think we can attend to the Nashville people. * * * When our man told me what Nashville Greenville was doing, I said: "Good—between us we will get Cup between the bumpers, and will give him a good squeeze."

Dula to Patterson (of secret company), Richmond, Va., October 6, 1903 (R. II, 569)—"At any rate, I think the best thing for you to do is to go right after each factory [independent] in Richmond with a brand identical to their best sellers, *i. e.*, get out a piece to go

against 'Sensible' and also a piece to go against 'Central Union,' etc."

See also letter Dula to Patterson directing efforts to purchase independents (R. II, 565).

One Augustus Craft was secretly furnished with funds to establish the Craft Tobacco Company at New Orleans, intended to destroy the People's Tobacco Company of that city. The clandestine correspondence concerning it (R. II, 629-650) reveals an almost incredible state of affairs. The following is from Craft, May 11, 1903 (R. II, 633)—

> My dear Mr. Dula.—I enclose you letter and sample paper. Please wire me on receipt of this if this paper and price is O. K., so I can then order it. I will as soon as the "Craft Tobacco Company" is ready for business *not only draw from the People's their principal force, but will endeavor to cause a strike in their factory.*

And this from Craft to Dula, May 12, 1903, R. II, 633)—"You need have no fear as to my success in carrying out *your purpose* in regard to the People's Tobacco Company. I am sure to get the support of the various Unions and somebody is got to get out of business eventually."

May 21, 1903, Craft wrote Hill (R. II, 636)—"I have the head engineer and foreman of People's Tobacco Co. now with me and expect to draw most of my labor supplies from the People's."

September 23, 1903, Craft to Hill (R. II, 642)—

> I am placing the goods where they should be placed and am in touch with men who will see that a certain element will consume the goods.

> If I only get fifty consumers a day you are not disturbed, but the opposition is weakened that much. Of course, this is an expensive method, but it is intelligent, as I know the opposition will soon feel the effects of my work, as they are now complaining of trade falling off some. In your letter to your attorney here the principal is absent and one of his confidential clerks got Mr. Parker's bill and your letter-head. Do you realize what power you placed in that clerk? Of course there is no probability of its being divulged, but it gave me a scare all the same. For Heaven's sake, when writing others do not use my name *except in cases where you ostensibly are to fight me.* * * * I realize much more than you do the immense financial loss that is at stake should the opposition in any part of the United States *know your plans.*

W. M. Carter was an officer of the Wells-Whitehead Tobacco Co., a creature of The American Tobacco Co., which loudly proclaimed independence and manufactured cigarettes at Wilson, N. C., where the Ware-Kramer Company—a genuine independent—was endeavoring to build up a business. The following is from the testimony of Hill (R. II, 298)—

> Mr. W. M. Carter, Wilson, N. C.
>
> Dear Sir: We are advised that a carload of cigarettes has been exported to China by the Ware-Kramer Tobacco Company. If possible I wish you would ascertain to what port these goods were shipped and the name of the consignee. If you cannot learn the name, perhaps you can find out the markings on the cases, as well as the point in this country from which the

goods were shipped by steamer. Yours very truly.

[There seems to be an initial] "P. S. H." [In writing with a pen this]: A carload means to us about five million cigarettes. If we get this information I think we can shut off their market. You wrote and sent out that letter?

A. Yes. We were interested in the British-American and any information we can give them we are going to do it. We are hired to look after our business and that is what we are going to do if we can.

Q. Did you succeed in shutting off this market?

A. I don't know anything more about it.

Q. You reported it to the British-American Co.?

A. If I got the information I did, but I am not quite sure about that.

Here is both spying and oppression. For other spying on this company see Hill's testimony (R. II, 296).

Secret companies were useful in efforts to obtain contracts from the Government, awarded only after competitive bidding. Patterson, of Richmond, wrote Dula (R. II, 563)—"It has also occurred to me that with present sentiment towards trusts the Government might be inclined to place the Navy contract with an independent house rather than the trust just to tickle the 'common people.'" They were also valuable as aid to defeat objectionable Congressional legislation (Dula, R. II, 580). Hamilton, of Bland Tobacco Company (a secret), wrote Dula in January, 1904 (R. II, 590)—

D. C. Williams, New York.

Dear Sir.—In response to your favor of January 11th, I was in Washington on the 15th and appeared before the Internal Revenue Sub-Committee on Ways and Means at the hearing of the Tawney Bill. While I did not intend to make any speech, force of circumstances made it necessary to state the position of my Company on the bill, and I trust with some effect. I found on my arrival in Washington that I had no friends working with me, or at least not in the open. I can say, however, that the hands of the organization have been very much weakened, and that Mr. Landstreet showed considerable nervousness after the meeting at the show of strength against the bill in Congress. I worked systematically on such manufacturers as desired the passage of the bill, but feared the destruction of trade-marks, and finally with the assistance of one other party who was working within their lines, got Mr. Landstreet to consent as a compromise, to ask the Committee to withhold any action until a circular could be sent out to the trade to ascertain their views. I was not let in on what was going on, but a friend gave me a copy of the circular, which I enclose to you. I could not under any circumstances sign this as my position has been plainly defined all the way through in opposition to the bill. It is, however, evident that if this Committee is asked under any pretext to withhold action, that it will cast serious doubt in their minds as to the advisability of ever passing it, and nothing will show more conclusively how divided the independent factories of the country are on this measure. If the Tawney bill should be reported to the House, I have

every assurance that a spirited fight will be made on the floor, and if we can only get Mr. Littlefield of Maine, as leader on the floor in a constitutional argument, followed by Mr. Shirley of Kentucky on the Democratic side, we will be in a good position to whip the bill even then. Mr. Dalzell, Chairman of the Committee, stated that while he thought that the Committee was in some degree pledged to the support of the measure, that he had serious doubts as to their right to pass it, and this doubt seems to rest in the minds of nearly every Congressman who is a lawyer. You might submit the enclosed circular to your attorneys, and if they have any suggestions to add strengthening our side in regard to it, it is possible that I could get the changes made through the party who gave me the information. I do not know, however, that that would be necessary.

Secret agencies have been used in persistent attempts to get control of remaining competitors. Efforts were made to buy Strater Brothers of Louisville (R. II, 734); Bagley of Detroit (R. II, 732); the United States Tobacco Company, Larus, Hancock and Dill of Richmond (R. II, 559, 560, 565, 567, 568); the manufacturers of scrap, Zahn, Scotten-Dillon, Bagley and Globe of Detroit (R. II, 345, 597; R. IV, 31, 69). They succeeded in clandestinely getting $10,000 stock in Scotten-Dillon (R. II, 740; Gov. Ex. 87, R. V). The foregoing are among the most prominent survivors mentioned in Answer of American Tobacco Company (R. I, 262).

* * * * I have already had very satisfactory interview with the party in question. I will

*Patterson, of Richmond, wrote Dula in May, 1903 (R. II, 559)—

have him with me and their brand also by July 1st, I hope. I may have to see you about this matter soon. I have engagement with him Sunday to further discuss the subject. I will be in no hurry about Mr. D——. Can get him if necessary but think can pinch him a little in few of his strongholds and thus make him anxious. The Metropolitan Tobacco Co. can have some influence in this direction. What do you think the "Central Union" brand is worth. They sold 750,000 pounds the past twelve months and rapidly increasing so they report. * * *

Patterson to Dula, September 15, 1904 (R. II, 572)—

I have been very much encouraged with the high stand our brands enjoy in this section and central West. All of them are increasing in demand and the dealers are pushing them, especially the Independent dealers. I am sure we would lose a great deal of business in everything except L. S. should we at any time lose our independence and only throw greater efforts toward competitors for the introduction of their brands by too many dealers who are inclined to push independent stuff. So long as our brands are with them they keep out just so many other independent brands. * * *

Dula to Patterson, January 26, 1905 (R. II, 577)—

I enclose herewith draft of letter, which I think should be sent to the Independent Tobacco Manufacturers Association, in regard to the resolutions passed at the last meeting of the association in December. I would suggest, if this letter meets with your approval, that you write it out in longhand, and submit to Mr.

Landstreet for discussion, before sending it to the Association. He being President of the Association, and present at the meeting that passed the resolutions, it would not be courteous to him to take the position that this letter does without first bringing it to his attention. * * * (The Patterson Company has been controlled by Continental or American Tobacco Company since 1903.)

False advertising and deliberate deception of the public and competitors were practiced (Hill, R. II, 232-360, 635, 646; Dula, R. II, 501-635, 650-664; R. III, 144-148; Pinkerton, R. IV, 1-38).

The price list of R. A. Patterson Company, issued 1905, when The American Company owned all the stock, contained this (Ex. 65, R. V, 500)—

> *NOTICE. Our plant is strictly and emphatically independent of all Trusts or Combines.* It is useless to suggest to any thoughtful merchant how necessary it is for him to have more than one source from which to secure his goods, and therefore it is to his interest to support and encourage competition in those lines he has to buy.

The Wells-Whitehead Tobacco Company, when owned by Blackwell's Durham Tobacco Company, subsidiary of The American Company, inserted weekly during 1905 the following advertisement in the "Tobacco Leaf" (R. V, 506)—

> Carolina Brights.
>
> *These are Independent, Anti-Trust, Union-made Cigarettes.* They give the Jobber and Retailer a good profit and give the consumer satis-

faction. They are made from old mellow tobacco, grown in Virginia and Carolina, and are the best money and experience can produce. Delivered and guaranteed. Jobbers will please write us for prices and terms.

Wells-Whitehead Tobacco Company,
Wilson, N. C.

See also advertisement Nall & Williams (R. IV, 116).

This flagrantly false advertisement of the J. S. Young Company, licorice makers of Baltimore, appeared weekly, 1903 to 1905 (R. III, 343), while it was under control—

J. S. Young Company,
Established, 1869.

Being informed that reports have been circulated among our customers to the effect that this Company cannot continue to exist on the small business given us by the Independent Tobacco Manufacturers—that our sources of root supply are likely to be cut off, and that we must soon be forced out of business—we desire to state that our sources of root supply are secure in spite of assertions to the contrary, made by people desiring to shake the confidence reposed in us by our customers—that we have on hand and to arrive sufficient Anatolian, Russian and Spanish Root for the next several years—and that we stand ready to supply the trade with our well-known and standard grades of Greek and Spanish licorice paste by the case or by contracts covering one or two years.

Furthermore, we believe that Independent Tobacco Manufacturers should be alive to the

fact that our competitors are particularly anxious, and are making special inducements to secure this trade, in order to deprive the Independent Licorice Manufacturers of their outlet for Paste—put them out of business—and then charge the consumers what prices they may please.

The Independent Tobacco Manufacturers, therefore, should look ahead far enough to see it for their best interests, both in the matter of future independence and of future prices, to give their undivided support to the *Independent Licorice Makers,* Baltimore, Md.

Defendants' conquest of the scrap business centering at Cincinnati strikingly illustrates how competition has been destroyed and monopoly secured. There were three leading manufacturers in that city. In 1903 The American Company, supplying the money with much secrecy through one Richards of Boston, sent Galbraith to Cincinnati where he organized the Queen City Tobacco Company, which manufactured and extensively advertised and sold scrap at destructive prices. It was run at heavy loss, and connection with The American Tobacco Company strenuously denied—Galbraith being a willing and ready tool. Competitors did not immediately succumb and another move seemed expedient. The Luhrman & Wilbern Tobacco Company, scrap manufacturers at Middletown, Ohio, openly owned by The American Company, beginning January, 1906, in a few months bid up tobacco cuttings (raw material for scrap) from eleven to twenty-two cents—more than the price of manufactured goods, less tax; and the Queen City at the same time cut prices on its

output. With this demoralization of selling prices and the Luhrman & Wilbern Company bidding up raw material, the independents at Cincinnati were naturally intimidated and hopeless; and in October, 1906, all three were secretly gathered in by The American Company through a new corporation (Dula, R. II, 603-615, 743; Hill, R. II, 306-310, 339; R. III, 140, 254; Pinkerton, R. IV, 8-13, 20, 21, 27; Hutchings, R. III, 238-255; Friedlander, R. IV, 67; McAndrews, R. IV, 117).

Some years ago tobacco manufacturers not then connected with the "Trust" organized an Association primarily intended for protection against it, and Landstreet of the United States Tobacco Company, Richmond (a really independent concern), became the president. Later, under the advice of Dula, he was employed by the secretly controlled R. A. Patterson Company, of Richmond, which posed as independent and was member of the Association. Landstreet thereafter continued as president until forced out by a demand for an affidavit or otherwise (R. II, 560, 575, 577-581; R. IV, 65).

Friedlander of the original Day and Night Company, Cincinnati, became the Secretary of the Association. Secretly he sold out to the "Trust," but retained the records (R. IV, 65).

Nall & Williams, of Louisville, another secret concern, was a member. Being "a wolf in sheep's clothing," Middleton of that company with some feeling wrote to Dula, February 6, 1904—"The finger of suspicion has been pointed at me until I am getting touchy on the subject" (R. II, 655, 657, 658). These and

other "wolves" were used to secure information and kept the "Trust" advised.

One use of "supply" companies was to obtain through them information about the business of competitors. The Mengel Box Company, for example, was required to report monthly the number of boxes which it sold to independents (R. II, 663).

Extensive advertising influences both business and public sentiment. In 1906 The American Tobacco Company in its own name spent $10,000,000 for advertising and distributing free goods (Hill, R. II, 252). Controlled companies are also large advertisers; and the sums spent by all are enormous. The possible influence of such outlays and its ramifications is apparent.

The foregoing and much more similar evidence cannot be swept away and a conclusion directly against it established by a mere general statement of his reasons for selling out to the "Trust" brought out in the cross-examination of a witness in their employ, and theretofore a tool in operating a secret company, who was called by the Government to prove certain facts peculiarly within his knowledge (See opinion of Lacombe, J., R. I, 292; and Friedlander, R. IV, 62 *et seq.;* Hill, R. II, 345).

XII.

Opinions and Final Decree.

Each Judge filed an opinion—Lacombe, Coxe and Noyes concurring, Ward dissenting (R. I, 291-328, 164 Fed., 700). The majority held defendants were engaged in interstate and foreign commerce and parties to combinations which directly restrained it; but they did not decide whether the evidence established monopolies or attempts to monopolize within Section 2 of the Sherman Act, although the subject was discussed by Noyes, *J.* Relying on *United States* v. *E. C. Knight Co.*, Ward, *J.*, concluded there was no direct restraint.

An attempt to summarize these opinions would be unprofitable—they are compact and must be read in order to be fairly understood. But some things said by the presiding Judge call for comment here.

He suggests that the evidence fails to show that defendants have practiced unfair, wicked or oppressive trade methods; and apparently he intends to convey the impression that they have not in fact injured commerce. All this we emphatically controvert; and we submit that the evidence in the record, some of which has been pointed out above, conclusively establishes the contrary.

Moreover, we do not concur in the extreme construction of the Sherman Act, announced by this learned Judge, according to which an ordinary partnership may be illegal, and *any* direct elimination of competition in interstate commerce through a contract or combination is criminal. We regard this as unwarranted by the decisions and untenable. It

would hinder rather than aid the purposes of the law makers; and certainly it is not essential to support the Government's insistence in the present proceedings wherein actual intent to restrain, material and unreasonable restraint and oppressive methods have all been established. We have pointed out *ante* p. 28, that in order to be illegal the direct effect or necessary tendency of the thing denounced must be the *material* restraint of commerce; and that nothing else appearing those ordinary business arrangements always enforced at common law are not affected by the statute.

THE FINAL DECREE.

1. Dismissed the petition as to Imperial Company; British-American Company and domestic corporations controlled by it (W. S. Mathews & Sons, T. C. Williams Company, David Dunlop, Incorporated); United Cigar Stores Company (retail branch of the combination and the individual defendants.

2. Adjudged the others parties to an unlawful combination (contracts and conspiracies were not specified) and enjoined them generally from continuing therein or doing anything in furtherance of the same (there was no finding as to monopoly).

3. Adjudged that the American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company and MacAndrews & Forbes Company (The Conley Foil Company was not included), were unlawful combinations and restrained them from engaging in interstate or foreign commerce.

4. Adjudged that The American Tobacco Com-

pany, American Snuff Company, American Cigar Company, P. Lorillard Company, R. J. Reynolds Tobacco Company, Blackwell's Durham Tobacco Company and The Conley Foil Company (but omitted other defendants—Havana Tobacco Company and British-American Tobacco Company) held shares in specified corporations (it omitted the Imperial Tobacco Company, British-American Tobacco Company, United Cigar Stores Co., and all corporations not named as defendants) and enjoined them from acquiring the plants or business or voting the shares of and from exercising control over the issuing companies (collecting dividends was not prohibited); and further enjoined the issuing companies from permitting control.

5. Adjudged costs in favor of petitioner; directed that nothing therein should prevent defendants from prosecuting or defending suits; and that the injunction should be suspended pending appeal.

XIII.

Errors assigned by The American Tobacco Company and others.

These defendants complain because the petition was not dismissed; more specifically, (a) because they were adjudged parties to a combination in restraint of interstate and foreign commerce, and enjoined accordingly; (b) because certain defendant corporations holding shares in others were enjoined from voting them or exercising control over the issuing company, and the latter from permitting this; and (c) because The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company

and the MacAndrews & Forbes Company were adjudged unlawful combinations and restrained from engaging in interstate and foreign commerce.

The Government established violations of Section 1 of the Sherman Act by proving, *first,* the existence of a combination, and, *second,* that the direct result or necessary tendency of this was the material obstruction, hindrance and restraint of interstate and foreign commerce. The conditions demand a decree adequate to destroy the mischief—one which will effectually roll away the impediment. "The relief granted should be adequate to the occasion" (Trans-Missouri Case, 166 U. S., 308).

A combination is "the union or association of two or more persons (or corporations) for the attainment of some common end." (Century Dictionary, Noyes on Intercorporate Relations, Sec. 302).

Defendants do not deny union and association of individuals and corporations for a common end. But relying on the E. C. Knight case they assert that those disclosed directly concern production and manufacture alone and that any restraint of interstate or foreign commerce is indirect and incidental. They further contend that union of competing businesses through executed sales and transfers of property to a corporation acting within the provisions of a State charter does not constitute unlawful combination, unless the main or primary purpose is unlawful.

This Court has often pointed out what is interstate and foreign commerce (Swift & Company *v.* United

States), and the answers, admissions and evidence concerning defendants' business establish that they and their predecessors have long been actively engaged therein. They buy leaf through representatives in all important markets in this country, Cuba, Porto Rico and Turkey, and cause this to be transported to their factories; they also purchase and assemble other crude materials; through many agents located or travelling, in every part of the United States and abroad, orders for manufactured products are solicited, forwarded to the general office and complied with by deliveries to common carriers; they sell and deliver their output to wholesalers, jobbers, other merchants and dealers in this country and abroad, some of which they directly control; operations are conducted in the name of The American Tobacco Company at New York and at nineteen branches in many States and by subsidiaries in different localities. They purchase the major portion of most types of domestic leaf; own and control the great leading brands of manufactured tobacco indispensable to merchants; produce, sell and distribute more than three-fourths of the domestic tobacco products (except cigars); control production of essentials for manufacture, etc.; and are possessed of tremendous financial strength.

The defendants are not mere manufacturers nor are their operations confined to a single State. The business of manufacturing goods in one State and then selling and shipping them to merchants or consumers in another is a part of interstate commerce (Loewe *v.* Lawlor); and when several competitors are so engaged there is competition in such commerce.

The relationship among them enables The American Tobacco Company to control (except the Imperial, with which there is agreement) and use all in unified tactics against opposition. Their power in concert to fix prices and suppress possible future competition necessarily follows from uncontraverted facts (See Opinion Coxe and Noyes, JJ., R. I, 295, 305).

The record discloses a series of combinations—beginning in 1890—organized with the express purpose to destroy and which did destroy all competition between powerful competitors in interstate and foreign commerce in tobacco; and that such commerce has been materially affected thereby. These were not brought about by *mere* acquisitions of manufacturing plants in the ordinary course; they were far more—business, good-will, agreements against competition, etc., were included, and all were parts of an unlawful plan, whose development and progress was advanced by duress, oppression and unfair methods intended to drive out and keep out competitors and secure monopoly.

The decisions of this Court establish that any combination which directly destroys competition, in its broad and general sense, hinders and restrains commerce and is unlawful.

The purposes of the Anti-Trust Legislation cannot be frustrated by operating through a corporation. The Northern Securities Case seems decisive of this although the acquiring company does no interstate business; where all are engaged therein (as in the present case) the doctrine is still clearer. (The Pearsall Case; Swift & Co. *v.* United States; Loewe *v.* Lawlor.)

The E. C. Knight case is not controlling; the remedy sought is not the same; the facts are radically different and the conclusion of the Court there concerning the direct effect of the arrangement on interstate commerce is impossible here. In his opinion in that case the Chief Justice said (17)—"There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." The proofs here under consideration establish not only intention to put a restraint upon commerce but consummation of the plan. In Loewe *v.* Lawlor, the Chief Justice likewise said—"The undisputed facts [In the Knight case] showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intention of the combination determined its legality." Here it conclusively appears that the arrangements were intended directly and materially to restrain interstate and foreign commerce and that such was the actual result.

In Northern Securities Co. *v.* United States, Mr. Justice White said of the Knight case (395)—"As the contract merely concerned the purchase of stock in the refineries and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies the Court held as the right to acquire was not within the commerce clause the fact that ownership of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden re-

sulting from the mere acquisition and ownership." Here the contracts concern vastly more than mere purchase of stock or acquisition of property and are full of conditions directly relating to interstate commerce. Purchased businesses *e. g.* were parts of commerce and the whole plan directly related thereto.

The present complaint is not merely as to acquisition and ownership of stocks or other property but is against what defendants have done and are now doing in commerce. Competition has been persistently destroyed; scores of contracts have retired skilled men from the trade; many have been forced out; and the necessary result of the plan long followed has been to give defendants power to exclude others and exercise monopoly. Their fixed purpose to attain these results may not be doubted. The monopolies, agreements and combinations disclosed directly restrain and obstruct not only the manufacture but the purchase, sale and exchange of both crude and manufactured commodities among the States and with foreign countries. The facts here plainly show this within the doctrines often announced by this court and especially in the Addyston Pipe Case, Montague *v.* Lowry, Swift & Company *v.* The United States, and Loewe *v.* Lawlor. The remedy asked by the Government finds support in all the opinions in the Northern Securities Case.

The American Tobacco Company was organized in 1890 with the purpose and effect of destroying competition in cigarettes and securing monopoly. It promptly extended operations to other departments and has

continued an effective instrumentality for perfecting defendants' unlawful designs.

The Continental Tobacco Company was organized in 1898 to unite powerful competing producers and distributors of plug tobacco and through it competition was effectively destroyed and monopoly acquired.

The same purpose and effect characterized the Consolidated Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, and the MacAndrews & Forbes Company. To the last of these the provisions of the Wilson Act are particularly applicable.

The final decree did no more than was necessary to destroy the unlawful combinations and prevent future violations—in fact it did not go far enough. Prohibition of acts in furtherance of the combination and also of control by one corporation of another is abundantly supported by *The Northern Securities Company* v. *United States; Swift & Company* v. *United States;* and *United States* v. *D. & H. R. R.*

That part of the decree which adjudges The American Tobacco Company and other corporations unlawful combinations and enjoins them from engaging in commerce seems without a precedent directly in point among the decisions of this Court; but it harmonizes with the duty effectively to enforce the Act by properly moulded decrees (*Swift & Company* v. *United States*).

The specified corporations are combinations in restraint of trade; their operations are unlawful and must be prevented in some effective way. The original constituents (acquired businesses) cannot now be identified and practically separated from each other by a

decree. There are two feasible ways to meet such a situation; one is to enjoin the companies as was done below; the other is to appoint a receiver and require him to undo the mischief by some process of disintegration. If serious inconvenience to the public would result from excluding a corporation controlling sources of supply from interstate trade, it might be decidedly preferable to appoint a receiver who could temporarily supply the demand and gradually restore competitive conditions. Obstructions to commerce should be removed by some practical procedure adopted with a view to public convenience.

The American Snuff Company controls the domestic output of snuff; and the MacAndrews & Forbes Company licorice products. The operations of these companies (corporate combinations) are unlawful and must be prevented either by injunction or through receiverships within the principles described above. This question is open under the Government's Assignment or Errors, No. VI (R. I, 340).

The very existence of certain defendants is criminal and certainly they cannot rightfully complain because restrained from carrying out the unlawful purposes of their creation; they are wilfully in positions where every act is a transgression.

Unlawful intent is a necessary inference from defendants' uniform plan of operations; that they have exercised duress, unfair and oppressive methods has been pointed out. The theory of "main intent of purpose" in connection with combinations and also the applicability of the statute to executed contracts is discussed *ante*, pp. 27, 75.

XIV.

Errors assigned by the Government; and Remedies which should be applied.

Full relief as prayed should have been granted. Errors complained of—specified in detail, Record I, 338-343—with appropriate remedies will be considered under the propositions following.

1. *The Petition should not have been dismissed as to the individuals.*

The purpose of the proceeding is to secure the effectual destruction of existing and prevention of threatened mischief. The corporations are mere instruments of the individuals who planned and brought about present conditions. If not enjoined they may at any time sever connection with defendant corporations, organize new ones and through them, or otherwise, carry on their unlawful purposes. No reason appears for leaving entire freedom to the intelligent manipulators who are directly responsible. The corporations and their officers are all guilty; and the injunction should run against all. The necessity for such action was pointed out in the Trans-Missouri Freight Association case, wherein it was held that injunction was proper even after dissolution (166 U. S., 308).

In *Northern Securities Company* v. *United States* there were individual defendants. The petition was not dismissed as to them; and the final decree adjudged that defendants "entered into a combination or conspiracy in restraint of trade and commerce among the several States," denounced as illegal by the Act of July 2, 1890. In the *Swift Case* the petition was sus-

tained as to the individuals, and they were included in the injunction.

2. *Observance and every act done in pursuance of the English contracts (of September, 1902), within the United States, should have been declared unlawful and prohibited. The Petition was wrongfully dismissed as to the Imperial Tobacco Company, British-American Tobacco Company and domestic corporations controlled by the latter.*

A paragraph in the opinion of the presiding Judge below (R. I, 294) contains the only reason given for dismissing the petition as to the Imperial and British-American companies. It is therein asserted that the contract of September, 1902, was made in London where it "was a legal and proper one"; but the record contains no proof to support this legality and propriety. The explanation of the Court's action is thus expressed—"It may be an enlightened public policy to prohibit an alien corporation from buying its raw material in this country unless it sends its products here to compete with American manufacturers; but if it be, this act seems not to have gone to that extent."

We respectfully submit that the opinion indicates an entire misapprehension of the English agreements, and that the reasons assigned for a decree in favor of the foreign companies are unsubstantial.

For a long time before 1902 the American Tobacco Company and subsidiaries were the most important American concerns trading in tobacco; and their busi-

ness extended to foreign countries, including Great Britain. Their most formidable competitors, located in the latter country, were old establishments which manufactured from American leaf, largely supplied their domestic markets, and also sold and shipped their brands elsewhere, including the United States.

The American Company (in 1901) purchased Ogden's Limited, of Liverpool, which did both domestic and foreign tobacco business, and through this and otherwise undertook to procure increased trade in Great Britain. The old companies there thereupon consolidated through the Imperial Company and a fierce world-wide conflict broke out between the two combinations. The Imperial Company and its predecessors purchased annually in the United States more than 50,000,000 pounds of leaf (over half of all exported to Great Britain, the largest foreign market) in sharp competition with the American opponents; likewise they sold manufactured tobacco throughout the world; and they were importers of tobacco products into the United States.

Under these conditions the competitors determined to end the conflict—in their own language, to "amalgamate" their business in England and also their export business from that country and the United States. Accordingly, they executed in England the two contemporaneous agreements of September, 1902 (Exs. 1 & 2, R. I, 111-124, *ante*, p. 113) and have strictly observed them.

The Imperial Company immediately took over Ogden's Limited (export business not included), issuing

therefor about 2,700,000 pounds sterling stock and admitting officers of the American companies to its Board of Directors; the British-American Tobacco Company was organized with 6,000,000 pounds capital—divided two-thirds to the American combination, and one-third to the Imperial Company—and took over the export business of both combinations with covenants against competition; the American companies and certain directors agreed not to engage in the tobacco business outside of the United States, its dependencies and Cuba, especially not in Great Britain; the Imperial Company and its directors agreed not to engage in the tobacco business beyond Great Britain and especially not in the United States (the right to buy and treat leaf tobacco in this country being reserved); each combination agreed that within allotted territory the other might manufacture all its brands under recipes to be furnished and that no sales should be made to any one who intended to export the goods to another's exclusive territory, etc. (R. I, 111-133).

These contracts must be considered together and no short statement can give adequate understanding of them. In the light of circumstances then existing their obvious and inevitable result was materially to restrain commerce in the United States—such a purpose is a necessary inference. The evidence establishes actual unlawful intent, direct material destruction of competition and material hindrance—all in positive violation of both the Sherman Act and the anti-trust provisions of the Wilson Act.

It is said that the contracts were made in England where they were lawful; that the Imperial Company's acquisition of Ogdens was simply the purchase of a rival with assets and good-will to suppress certain competition in England and not to regulate prices; that owing to the tariff laws of the two countries effective competition was not possible; and that the transfer to the British Company of the export business was simply a purchase and sale with proper and necessary covenants without combination of a number to stifle competition or fix prices.

In reply to the contention that the contracts were valid where made it suffices to say that the law of England is matter of fact to be proved by competent evidence, and there is none in the record. The only evidence concerning their validity was given by Mr. Fuller, a defendant. He was asked—"Did you hear any objection to these contracts being illegal or invalid under the laws of Great Britain;" and replied—"No, sir, on the contrary I understood that they were certainly valid" (R. IV, 719).

No arrangement, foreign or domestic, can protect parties acting here in violation of our statutes.

The contracts and surrounding circumstances show that the acquisition of Ogdens was not simply a purchase by one English company of the business and assets of another in the ordinary course but that much more than a sale of property in England was both intended and accomplished.

Ogdens was purchased by the American Tobacco Company in 1901 for $5,347,000—about 1,300,000

pounds (R. II, 50), and afterwards became obligated to English customers to distribute among them for five years all profits, and in addition 200,000 pounds sterling annually. "It didn't have any money of its own; it wasn't making enough profits to pay its way, so it had to borrow money" (Harris, R. III, 432). Thereafter (in 1902) it was turned over to the Imperial, the latter issuing for good-will, etc., 1,500,000 pounds of stock, and for the tangible assets (not including the export business) 1,217,000 pounds more—2,717,000 pounds in all, or a little over $13,000,000 (Harris, R. II, 56).

The American Company owned Ogdens Limited but the contracts were also signed by the Continental Tobacco Company, American Cigar Company and the Consolidated Tobacco Company and each (also certain directors) stipulated that it would not "either solely or jointly with any other person or persons, company or companies, directly or indirectly, carry on or be employed, engaged, or concerned, or interested in the business in the United Kingdom of a tobacco manufacturer, or in any dealing in tobacco or its products therein, or sanction the use of its name in connection with any such business therein," etc. (R. I, 116). The Imperial Company (alleged mere purchaser) and its directors similarly covenanted against engaging in the tobacco business in the United States except to buy and treat leaf. *

And yet the Court is asked to believe that the arrangement "was a simple agreement for the sale of property and good-will of corporation 'A' to corporation 'B'"!

* See also paragraph 22 "English Agreement," Ex. 1, R. I. 121, wherein it was agreed that each company with its directors should give the other "the full benefit of their good will and support" in the country to be exclusively exploited by each.

The charter of the British-American Company recites that it was formed to carry out the arrangement between the two combinations; it took over the export business from both countries with the right to use all brands, trade-marks, etc., "now owned or hereafter acquired or adopted," issuing stock therefor; each of the old companies agreed that it would not "either solely or jointly with any other person or persons, company or firm, directly or indirectly, carry on or be employed, engaged or concerned or interested in export business." With the outward semblance of sale there was really combination of competitors and division of territory.

The practical results are that the American companies are forbidden to export from the United States, and likewise the Imperial from Great Britain; that all competition between the old concerns as sellers has been annihilated; that the British-American Tobacco Company has a monopoly of exporting tobacco products; that the former competitors are jointly interested in the profits of the Imperial and of the British-American Company, and also in prices paid for leaf and obtained for goods; that the American companies have been enabled to sell two-thirds of their Imperial Company stock at a large profit, but continue to be important stockholders and select three directors; that at least 6,000,000 pounds of leaf, formerly purchased here by the Imperial Company for the export business in competition with the American companies, is now bought by the latter for the British-American Company along with all other leaf required by it; that while the Im-

perial Company maintains an agency in this country for purchasing leaf, the relationship between it and the American companies is so intimate as to preclude genuine competition; in short, all motive therefor has been destroyed and the world's business parceled out.

The petition asked (Prayer 2, R. I, 107) that the combination, evidenced by agreements of 1902, be declared illegal and that defendants be restrainde from acting in pursuance thereof within the United States. Their strict observance is admitted; they are unlawful; and all parties before the Court should be enjoined from acting thereunder.

It likewise asked (Prayer 3, R. I, 107) that the Imperial Company be enjoined from doing business within the United States until it shall cease to observe the agreements of 1902. This observance is a violation of our law which the Court should prevent; and the effectual way is to enjoin the company as prayed. Congress has declared the "enlightened public policy" and made it obligatory upon the Courts.

The anti-trust provisions of the Wilson Act as well as the Sherman Act are wholly inconsistent with the suggestion that tariff laws in effect give license for foreigners to contract with domestic corporations against all attempts to compete.

In 1902, and before certain of the goods manufactured by the Imperial Company were imported and sold by it in this country; and the American companies likewise exported largely to Great Britain. Active com-

petition occasioned the execution of the agreements. Bearing in mind that the combination was formed September 27, 1902, the statistics concerning exported manufactures of tobacco forcefully answer the argument that commerce was not and could not have been seriously affected.

Exports from the United States to Great Britain, and their value, in fiscal years ending June 30th were—

1902, Cigarettes—158,484,000; value $338.276. Plug—4,212,352 pounds; value $811,140.

1903, Cigarettes—127,548,000; value $371,984. Plug—1,753,106 pounds; value $398,417.

1904, Cigarettes—30,965,000; value $84,285. Plug—1,041,814 pounds; value $202,305.

1907, Cigarettes—5,976,000; value $14,797. Plug—1,344,557 pounds; value $215,028.

(See Commerce & Navigation of the U. S., 1906, pp. 751, 752, 753; 1907, pp. 768, 769.)

The Petition asked (Prayer 4, R. I, 107) specifically that the British-American Company be adjudged an unlawful instrumentality and enjoined from doing business; and further (Prayer 6, R. I, 108), that it be restrained from holding shares, etc., in other companies. This corporation was specially formed to carry out the contracts of September, 1902, and whatever it does here is in furtherance of them and unlawful.

Following the general plan British-American Tobacco Company acquired the shares and controls certain domestic corporations—defendants, T. C. Williams Company, W. S. Mathews & Sons, David Dun-

lop, Inc.—and has a monopoly in export trade. The decree below declared unlawful and prohibited such control by domestic companies over others. A foreign charter cannot give license here for things criminal when done by a domestic corporation (R. I, 294).

3. *The petition should not have been dismissed as to the United Cigar Stores Company.*

A material part of Judge Cox's opinion (R. I, 302) is devoted to showing why no injunction should issue against the United Cigar Stores Company. The Government did not ask that this defendant be prohibited from doing interstate business; but sought to prevent The American Company from controlling and using it to destroy competition and acquire more complete monopolies. This would leave it standing alone to work out its own destiny.

The United Company was organized in the Spring of 1901 with $2,500 paid-up capital by parties not then connected with The American Tobacco Company (R. III, 97, 98), but in November following its possibilities were recognized and its originators, appreciating the tremendous advantage of the association, surrendered control (R. III, 99, 100). Since then The American Tobacco Company has put millions into the enterprise (it holds $1,350,000 of $1,650,000 stock, also $2,850,000 bonds), and results have justified expectations. In 1907 its sales at retail were $16,000,000 and profits very large. This company is accorded special privileges over other retailers—a discount of 5 per cent.; and is supported by defendants' united power. To compete with it under existing conditions is beyond the rea-

sonable hope of any ordinary dealer. A growth from nothing to $16,000,000 in seven years indicates something beyond mere business ability.

The purposes for which The American Company intends and uses the United sufficiently appear from letters in the Record which are set out *ante* pp. 155-9, together with the evidence there collected.

The permanent success of tobacco manufacturers depends upon the friendly co-operation of retailers. The Answer says (R. I, 258), "Of course the good-will of the wholesale dealer and retail dealer is to be desired by a manufacturer." Control of retailing in the populous centers is one of the most insidious and effective methods devised by defendants for perfecting their plans.

In order to allay opposition and secure headway, ownership of the United Company was long concealed and denied—how strenuously is indicated by the false statements in a letter from the Vice-President of The American Tobacco Company copied *ante*, p. 158.

It is said in defense of the United Company that it sells the goods of any manufacturer. Its managers have acumen, and of course will supply a demand already worked up. "In the tobacco business a manufacturer must create such a condition that consumers will call for his products" (Ans. A. T. Co., R. I, 258). Defendant Duke says (R. IV, 416), "I told Whelan he must supply the demand for the goods the public wanted or else he would fail in his business, and if they wanted goods made by other manufacturers than the

American Tobacco Co. he must supply them; supply them just as regularly as he would our goods. * * * Yes; they can't succeed unless they do it in that way." It is wise to get the profit, hold the customer and gain control of distribution.

Consideration of well known trade methods will suggest the effectiveness of the course pursued. If a manufacturer must depend on a powerful competitor to distribute his goods he may confidently expect early bankruptcy. Moreover, refusal to sell independent goods would have disclosed the carefully guarded, often denied, secret connection with the Trust (R. II, 232).

The United Company owns shares of other corporations through which it operates; is actively engaged in interstate commerce; and following the general plan is seeking control in the retail trade. The stores operated are not now very numerous but their sales (the important consideration) are very large; and for obvious reasons shops for retailing tobacco *exclusively* are not likely to become a very large proportion of all the places where such sales are made. The time to prevent monopoly is before the possibility of competition has been utterly destroyed. (*Montague* v. *Lowry*, 193 U. S., 28-46.)

4. *The final decree should have adjudged defendants parties to unlawful contracts and conspiracies.*

The defendants have long operated in open violation of the law. Its future enforcement and their proper punishment may be materially aided if this Court declares that the record reveals unlawful conspiracies.

"A conspiracy is sufficiently described as a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means." (*Pettibone* v. *United States,* 148 U. S., 197-203; Noyes on Intercorporate Relations, Secs. 324 *et seq.*)

5. *The final decree should have adjudged that defendants were attempting to monopolize and had monopolized parts of commerce* (*Assignment* 2, *R. I,* 339). *More particularly it should have adjudged that The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, The Conley Foil Company and the British-American Tobacco Company were severally attempting to monopolize and had monopolized parts of commerce* (*Assignment* 6, *R. I,* 340). *And appropriate remedies should have been applied.*

The lower Court decided nothing concerning monopoly, although Judge Noyes discussed the subject. All concurring Judges may have concluded that the decree pronounced gave the full measure of relief possible in any event; but the Government distinctly charged violations of Section 2 of the Sherman Act, introduced abundant supporting evidence, and we submit the point should be decided, especially as effective relief as against the British-American Company and the Conley Foil Company may depend upon it.

The petition asked that *all* defendants be declared parties to attempts to monopolize and to existing mo-

nopolies (R. I, 108), and specifically that the American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, Mac-Andrews & Forbes Company and the Conley Foil Company be declared to have monopolies. Except the Foil Company, those named were adjudged unlawful combinations and enjoined; the petition was dismissed as to the British-American Company; and the Foil Company was restrained from permitting control by the American Company. Both the British Company and the Foil Company have monopolies.

The relevant principles of law were considered *ante*, p. 64. Violations of Section 2 appear sufficiently established by showing power to fix prices and destroy competition acquired by the unification or combination of competing businesses through corporations. If it be necessary to show coercion, duress, unfair or oppressive trade methods they clearly appear from the facts collected and reviewed, *ante*.

Monopoly is a practical conception and its existence must be determined by practical considerations, keeping in view the purposes and methods of business. The effect of defendants' action upon commerce among the States and with foreign nations is not accidental, secondary, or remote; that commerce is the direct object of attack; and ~~not~~ to control and dominate it as to purchases, sales, and otherwise, is the special purpose for the sake of which the several acts and courses of conduct are done and adopted (*Swift & Co.* v. *United States*, 196 U. S., 375, 397).

The history and operations of The American Tobacco Company disclose a constantly expanding purpose to acquire dominion and the present possession of power to control prices of tobacco (except cigars) and other commodities; to destroy existing competition and to deter attempts by others.

The American Snuff Company was organized to combine competitors and hold a monopoly; and as the result of systematically combining competitors and acquiring control of them it has now 96 per cent. of domestic commerce in snuff. No important competitor remains.

The American Cigar Company and the American Stogie Company were organized to combine competitors and monopolize. Neither has yet been able to secure a practical monopoly; but they are trying and in a brief time have made material progress.

The MacAndrews & Forbes Company was organized to secure and has obtained a practical monopoly of domestic and foreign commerce in licorice root and its products; and all substantial competition has been destroyed. One former competitor (Lewis, who manufactures about a million pounds annually) remains; but he depends on the combination for raw material and exists by sufferance. This company, as the result of combinations, unifications, unfair trade methods, etc., controls more than 95 per cent. of the trade. Contracts at remunerative prices with the American Tobacco Company and subsidiaries (who together utilize much the greater part of licorice products) insure substantial dividends and leave it in position easily to ruin any

venturesome antagonist. The Wilson Act is peculiarly applicable to this company. The intentional destruction of competition between importers is patent.

The Conley Foil Company was organized to take over the business of John Conley & Son and bring it under control of the American Company. Within the doctrines announced by the Court below it probably did not become immediately an unlawful corporate combination; but the power of its principal owner and acquisition of a competitor have enabled it to secure a practical monopoly. Only one important opponent remains. The Foil Company by agreement, and at profitable prices, supplies other members of the combination who together utilize much the larger part of the total domestic production. It may, therefore, when desirable (and this has happened) put any excess production upon the market at prices which no competitor can meet. It now has over 75 per cent. of the trade and, if present tendencies are not arrested, a larger proportion will inevitably and quickly fall into its hands.

The British-American Company has acquired all going domestic concerns of consequence formerly largely engaged in exporting manufactured tobacco and has a monopoly of that commerce—it controls practically all.

The American Tobacco Company necessarily has a monopoly if a subsidiary does; and through control of others it has a general monopoly of the trade.

Where a corporation has an unlawful monopoly which cannot be destroyed by severing the original parts, the effective relief is either to enjoin it from

doing interstate and foreign commerce or to appoint a receiver with direction to restore competitive conditions.

6. *The decree should have described certain general methods followed by defendants in carrying out their unlawful purposes and prohibited them from restraining or monopolizing commerce through these or similar ones.*

These general methods were: (a) By combining ownership and control of plants, assets and businesses of competitors in a corporation specially organized for that purpose which thereupon acquired the plants, assets and businesses of persons, firms and corporations theretofore in competition, taking from them agreements not to engage in the business; (b) by causing a going corporation to secure conveyances of plants, assets and businesses of those formerly competing with it, taking from them agreements not to engage in the business; (c) by causing a corporation to acquire ownership of stock in other corporations competing with it and with each other, taking from the principal owners agreements not to engage in the business, and having acquired the same, to exercise the powers and rights incident thereto; and (d) by agreements assigning specified territory to one party to be exploited without competition from others, as in the English contracts.

7. *The decree should have specified all shares owned by each defendant corporation as disclosed by the evidence (whether alleged in the Petition or not); and*

should have enjoined the holders from exercising control, etc., over the issuing corporations, and the latter, if defendants, from permitting such control.

The technical rules of equity pleading and practice should not be strictly applied in proceedings under the Sherman Act where the especial purpose is expeditious relief (*Swift & Co.* v. *United States*). Changes in stock ownership easily occur and it may be impracticable to ascertain the exact relationships in a world-wide combination before filing a petition. The remedy should be applied to conditions disclosed by the evidence, when possible without injustice. Government's Exhibit 87 (R. V) reveals the relationship amongst the corporations.

The British - American Company holds shares in the Amsterdam Supply Co., David Dunlop (Inc.), W. S. Mathews & Sons and T. C. Williams Company, all defendants (Ex. 87, R. V). This should have been recited in paragraph "Fourth" of the decree (R. I, 332) and the consequent injunction (R. I, 333) made to apply.

The Havana Tobacco Company holds shares in defendant, the Amsterdam Supply Company, and in the following, not defendants: H. de Cabanas y Carbajal; H. Clay & Bock & Co., Limited; Cuban Tobacco Co.; Havana Commercial Co.; Havana Cigar & Tobacco Factories, Limited; and J. S. Murias y Co. This should have been recited in paragraph "Fourth" of the decree and the injunction made to apply.

In addition to those enumerated as held by The American Tobacco Company in paragraph "Fourth" of the decree (R. I, 332), it holds shares in defendant corporations, Imperial Tobacco Company, British-American Tobacco Company, United Cigar Stores Company, and the following companies not defendants: American Machine & Foundry Co.; Acker, Merrall & Condit Co.; Butler-Butler, Inc.; The Reynolds Tobacco Co.; Standard Tobacco Stemmer Co.; and Star Tobacco Co. (Ex. 87, R. V). These should have been included in the recitals and in the consequent injunction.

8. *The decree should have enjoined defendant corporations holding shares of others from collecting dividends thereon.*

For some unexplained reason the court below refused the Government's express request to incorporate this provision. The decree in the Northern Securities Case, approved by this Court, contained it; and we submit conditions here demand the same thing.

9. *The decree improperly provided that nothing therein should prevent defendants from prosecuting or defending suits; also improperly suspended the injunction pending appeal.*

The Court should not have undertaken to prescribe the effect of the decree in other proceedings. The defendants are wilful transgressors, should be so treated everywhere, and certainly should not be shielded.

The injunction should have issued—the object of

the statute is prompt relief. While the injury already done cannot now be cured, disapproval of the course pursued may prevent repetition of the error.

The defendants, in violation of law, for many years and with great success, have persisted in destroying competition, obstructing commerce and acquiring monopolies. They have become immensely powerful and only vigorous measures can remove the mischief brought about by them. We submit that the situation imperatively demands a decree which will utterly destroy the unlawful arrangements now existing and prevent any similar ones in the future.

GEORGE W. WICKERSHAM,
Attorney General.

J. C. MCREYNOLDS,
Special Assistant to the Attorney General.

October, 1909.

Appendix "A."

ACT OF CONGRESS JULY 2, 1890, ENTITLED, *"An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies"* (26 Stat., 209)—

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign na-

tions, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas

to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof), mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, or the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Appendix "B."

WILSON TARIFF ACT OF AUGUST 27, 1894 (28 Stat., 570)—

SEC. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof in any court of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

SEC. 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this act; and it shall be the

duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 75. That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof), mentioned in section seventy-three of this act, and being in the course of transportation from one State to another, or to or from a Territory, or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and con-

demnation of property imported into the United States contrary to law.

SEC. 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Appendix "C."

[From Year Book, Department of Agriculture, 1908, p. 680.]

Acreage, production, value, exports and imports of leaf tobacco in the United States, 1900–1908.

Year.	Acreage.	Average yield per acre.	Production.	Average farm price per pound, Dec. 1.	Farm value, Dec. 1.	Domestic exports of unmanufactured, fiscal year beginning July 1.	Imports of unmanufactured, fiscal year beginning July 1.
	Acres.	Pounds.	Pounds.	Cents.	Dollars.	Pounds.	Pounds.
1900	1,046,427	778.0	814,345,341	6.6	53,661,132	315,787,782	26,881,2[illegible]
1901	1,039,199	788.0	818,953,373	7.1	58,283,108	301,007,365	29,428,8[illegible]
1902	1,030,734	797.3	821,823,963	7.0	57,563,510	368,184,084	34,016,9[illegible]
1903	1,037,735	786.3	815,972,425	6.8	55,514,627	311,971,831	31,162,6[illegible]
1904	806,409	819.0	660,460,739	8.1	53,382,959	334,302,091	33,288,3[illegible]
1905	776,112	815.6	633,033,719	8.5	53,519,068	312,227,202	41,125,9[illegible]
1906	796,099	857.2	682,428,530	10.0	68,232,647	340,742,864	40,898,8[illegible]
1907	820,800	850.5	698,126,000	10.2	71,411,000	330,812,658	35,005,1[illegible]
1908	875,425	820.2	718,061,380	10.3	74,130,185	.....	.....

Appendix "D."

[From Year Book, Department of Agriculture, 1907, p. 675.]

Acreage, production and value by States of leaf tobacco grown in the United States, 1907.

State or Territory.	Acreage.	Average yield per acre	Production.	Average farm price Dec. 1.a	Farm value Dec. 1.a
New Hampshire	100	1,650	165,000	12.0	20,000
Vermont	200	1,625	325,000	12.0	39,000
Massachusetts	4,700	1,525	7,167,500	11.0	788,000
Connecticut	14,400	1,510	21,774,000	11.5	2,501,000
New York	7,100	1,150	8,165,000	6.0	490,000
Pennsylvania	32,000	1,260	40,320,000	7.5	3,024,000
Maryland	25,700	660	16,962,000	6.5	1,103,000
Virginia	98,100	760	74,556,000	10.5	7,828,000
West Virginia	4,800	720	3,456,000	10.0	346,000
North Carolina	161,400	625	100,875,000	11.0	11,096,000
South Carolina	22,300	900	20,070 000	10.7	2,147,000
Georgia	3,700	860	3,182,000	40.0	1,273,000
Florida	7,500	925	6,937,500	45.0	3,122,000
Ohio	67,200	900	60,480,000	8.4	5,080,000
Indiana	15,000	940	14,100,000	9.8	1,382,000
Illinois	1,100	800	880,000	10.0	88,000
Wisconsin	35,100	1,100	38,610,000	6.5	2,510,000
Missouri	1,500	825	1,237,500	11.0	136,000
Kentucky	270,200	890	240,478,000	10.2	24,529,000
Tennessee	46,500	800	37,200,000	9.8	3,646,000
Alabama	600	450	270,000	24.0	65,000
Mississippi	100	475	47,500	30.0	14,000
Louisiana	100	350	35,000	28.0	10,000
Texas	500	700	350,000	30.0	105,000
Arkansas	900	570	513,000	13.5	69,000
United States	820,800	850.5	698,126,000	10.2	71,411,000

(a) Prices of certain cigar types given in this table were based upon reports made in April, 1908, no market having been established on December 1.

"Appendix "E."

[From Year Book, Department of Agriculture—1908, p. 680.]

Acreage, production, and value by States of leaf tobacco grown in the United States in 1908.

States.	Acreage.	Production.	Farm value December 1.
	Acres.	Pounds.	Dollars.
N. Hampshire	99	178,200	24,948
Vermont	200	347,000	45,110
Massachusetts	4,512	7,444,800	1,153,944
Connecticut	13,824	23,224,320	3,948,134
New York	6,177	7,257,975	689,508
Pennsylvania	29,440	39,008,000	4,095,840
Maryland	26,000	18,200,000	1,365,000
Virginia	140,000	114,100,000	10,497,200
West Virginia	6,200	4,650,000	651,000
N. Carolina	200,000	134,000,000	14,070,000
S. Carolina	29,000	25,085,000	2,508,500
Georgia	2,775	2,705,625	946,969
Florida	5,625	5,568,750	1,949,062
Ohio	50,400	33,768,000	3,545,640
Indiana	12,450	8,715,000	1,045,800
Illinois	1,500	1,132,500	96,262
Wisconsin	35,000	39,550,000	3,955,000
Missouri	2,500	2,187,500	273,438
Kentucky	240,000	195,600,000	17,799,600
Tennessee	65,000	52,000,000	4,680,000
Alabama	630	283,500	73,710
Mississippi	100	25,000	6,250
Louisiana	102	86,700	27,744
Texas	3,000	2,400,000	600,000
Arkansas	891	543,510	81,526
United States	875,425	718,061,380	74,130,185

Appendix "F."

Figures from Gov. Ex. 77 showing total output of *cigarettes* in the United States, 1890–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages.

Year.	Total output for United States.	Total for American Tobacco Co. and Subsidiaries.	Percentage.
1890	2,505,167,610	2,453,458,000	97.9
1891	3,137,318,596	2,798,946,500	89.2
1892	3,282,001,283	2,881,797,240	87.8
1893	3,660,755,959	3,031,265,500	82.8
1894	3,620,666,804	2,974,366,250	82.1
1895	4,237,754,453	3,467,074,670	81.8
1896	4,967,444,232	4,063,747,900	81.8
1897	4,631,820,620	3,814,032,640	82.3
1898	4,385,783,897	3,792,284,120	86.4
1899	3,744,975,403	3,489,767,060	93.1
1900	3,258,716,305	2,982,518,585	91.5
1901	2,728,153,697	2,351,695,755	86.2
1902	2,971,360,447	2,326,246,790	78.3
1903	3,366,486,715	2,543,056,750	75.5
1904	3,433,993,422	2,544,658,160	74.1
1905	3,678,727,411	2,805,252,730	76.3
1906	4,511,997,137	3,354,797,800	74.3
1907	5,309,158,177	3,925,506,700	73.9

Note 1.—Prior to 1897 the above figures include little cigars; since 1897 cigarettes only. This must be considered when comparing percentages.

Note 2.—In 1897 Congress authorized the manufacture of tobacco for export (tax free) in "Bonded Manufacturing Warehouses, Class 6." In 1900 and since The American Tobacco Company or the British-American Co. manufactured cigarettes for export in these warehouses. Their outputs are not reported to the Commissioner of Internal Revenue and are not included in the above figures. They are in Appendix "G" *post;* and must be considered when comparing percentages.

Note 3.—The use of cigarettes made from Turkish tobacco has enormously increased in fifteen years and some pioneers in this branch do a large business, especially in New York City.

Appendix "G."

Total exports of *Cigarettes*, 1901–1907, taken from "Commerce and Navigation of the United States;" also *Cigarettes* manufactured in bonded warehouses for export by American Tobacco Company and subsidiaries, as shown by Ex. 84, R. V.

Year.	Total exports from United States.	Total manufacture in bonded warehouses for export by American Tobacco Company and subsidiaries.
1901	(2) 1,052,390,000	(3) 1,004,261,000
1902	1,273,614,000	1,271,817,700
1903	1,456,452,000	1,495,823,400
1904	1,528,406,000	1,899,217,760
1905	1,837,803,000	1,852,919,100
1906	1,710,939,000	1,912,582,900
1907	1,998,095,000	1,805,117,150

Note 1.— Figures showing total exports are taken from "Commerce and Navigation of the United States," 1905, page 727; 1906, p. 752; 1907, p. 768. Figures showing total manufacture in bonded warehouses for export by American Tobacco Company and subsidiaries were furnished by defendants.

Note 2.— Figures for fiscal years ending June 30.

Note 3.— Figures for calendar years.

Appendix "H."

Figures from Gov. Ex. 78 (R. V.) showing total output of *Smoking Tobacco* in the United States 1890–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages. The totals are expressed in pounds.

Year.	Total output for United States.	Total for American Tobacco Co. and subsidiaries.	Percentages.
1890	69,829,445	5,466,619	07.8
1891	76,708,300	10,371,877	13.5
1892	75,108,503	16,331,320	21.7
1893	76,448,651	16,363,552	21.4
1894	83,293,044	17,106,907	20.5
1895	82,341,298	18,527,839	22.5
1896	83,548,984	17,294,015	20.7
1897	85,463,194	20,648,114	24.2
1898	89,240,526	23,962,914	26.9
1899	102,468,594	55,466,554	54.1
1900	101,548,467	62,130,835	61.2
1901	112,156,974	68,187,535	60.8
1902	131,130,733	87,550,618	66.8
1903	134,359,183	89,757,663	66.8
1904	149,151,690	101,463,889	68.
1905	165,208,982	111,231,133	67.3
1906	175,664,091	123,026,237	70.
1907	179,172,512	127,638,531	71.2

Note 1.—The above figures of manufacture by The American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from annual reports Commissioner of Internal Revenue.

Note 2.—Manufactures for export in Bonded Warehouses, Class 6, are not included—but they are very small.

Appendix "I."

Figures from Gov. Ex. 79 (R. V.) showing total output of *Plug* and *Twist* in the United States 1891–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages. The totals are expressed in pounds.

Year.	Total for United States.	Total for American Tobacco Co. and Subsidiaries.	Percentages.
1891	166,177,915	4,342,790	02.6
1892	171,081,575	5,931,737	03.5
1893	147,936,380	8,707,192	05.9
1894	160,069,955	8,974,117	05.6
1895	167,798,213	20,805,781	12.4
1896	153,397,907	31,370,491	20.4
1897	185,730,395	38,065,219	20.5
1898	160,876,541	36,134,694	22.5
1899	165,755,390	93,211,157	56.2
1900	173,890,614	109,168,330	62.8
1901	172,498,786	120,441,888	69.8
1902	185,736,781	134,636,727	72.5
1903	182,551,095	138,862,380	76.
1904	172,162,481	126,313,233	73.4
1905	166,953,570	134,049,748	80.3
1906	176,749,800	143,906,868	81.4
1907	172,002,513	137,207,883	79.7

Note 1.—The above figures of manufacture by The American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from reports Commissioner of Internal Revenue.

Note 2.—Manufactures for export in Bonded Warehouses are not included. In 1907 (calendar year) defendants made in such warehouses 4,866,419 pounds. What amount of plug they made outside of bonded warehouses which was exported does not definitely appear; but defendant Harris testified that they make nearly all exported manufactured tobacco products.

Appendix "J."

Figures from Gov. Ex. 80 (R. V.), showing total output of *Fine Cut* in the United States 1891–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages. The totals are expressed in pounds.

Year.	Total Output for United States.	Total for American Tobacco Co. and Subsidiaries.	Percentage.
1891	16,968,870	262,114	01.5
1892	16,222,689	550,281	03.4
1893	14,202,671	513,760	03.6
1894	13,696,334	584,429	04.3
1895	13,265,329	562,186	04.2
1896	11,761,690	547,832	04.7
1897	12,127,268	544,922	04.5
1898	11,415,231	689,101	06.
1899	11,687,838	6,001,417	51.3
1900	11,462,797	5,765,425	50.3
1901	11,722,314	5,674,310	48.4
1902	12,065,617	9,138,522	75.7
1903	11,893,051	9,230,014	77.6
1904	12,151,003	9,676,816	79.6
1905	11,684,184	9,410,803	80.5
1906	12,742,345	10,321,285	81.0
1907	12,457,917	10,115,315	81.1

Note.—The above figures of the manufacture by The American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from reports of Commissioner of Internal Revenue.

Appendix "K."

Figures from Gov. Ex. 81 (R. V.) showing total output of *Little Cigars* in the United States, 1898–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages.

Year.	Total for United States.	Total for American Tobacco Co. and Subsidiaries.	Percentage.
1898	456,826,384	232,909 700	51.
1899	622,318,245	409,932,660	65.9
1900	610,926,720	382,045,700	62.5
1901	775,248,236	555,263,740	71.6
1902	676,115,995	512,740,310	75.8
1903	592,406,721	422,564,755	71.3
1904	736,187,259	586,642,960	79.7
1905	803,641,616	630,405,800	78.4
1906	989,751,253	804,425,670	81.3
1907	1,069,215,111	954,001,460	89.2

Note.—The above figures of the manufacture by The American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from reports Commissioner of Internal Revenue.

Appendix "L."

Figures from Ex. 82 (R. V.) showing total output of *Snuff* in the United States 1891–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages. The totals are expressed in pounds.

Year.	Total output for United States.	Total for American Tobacco Co. and Subsidiaries.	Percentage.
1891	10,674,241	311,750	02.9
1892	11,426,927	618,718	05.4
1893	11,952,735	457,736	03.8
1894	11,582,838	499,361	04.3
1895	10,887,709	615,857	05.7
1896	12,708,919	715,781	05.7
1897	13,768,455	664,274	04.8
1898	13,607,631	813,560	06.
1899	14,723,392	4,868,880	33.1
1900	13,805,811	9,315,303	67.5
1901	17,513,317	13,930,559	79.5
1902	18,682,341	16,069,899	86.0
1903	21,084,427	18,109,046	85.9
1904	20,489,963	18,666,210	91.1
1905	21,827,374	20,011,538	91.7
1906	23,566,731	22,575,826	95.8
1907	22,960,038	22,067,234	96.1

Note.—The above figures of the manufacture by the American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from reports of Commissioner of Internal Revenue.

Appendix "M."

Figures from Gov. Ex. 83 (R. V.), showing total output of *Cigars, Cheroots,* and *Stogies* (weighing 3 lbs. per thousand or more), in the United States, 1892–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages.

Year.	Total output for United States.	Total for American Tobacco Co. and Subsidiaries.	Percentages.
1892	4,674,708,260	85,560,000	01.8
1893	4,341,240,981	68,335,000	01.6
1894	4,163,641,327	53,035,000	01.3
1895	4,099,137,855	63,297,000	01.5
1896	4,048,463,306	66,318,000	01.6
1897	4,431,050,509	73,711,000	01.7
1898	4,458,836,966	99,241,000	02.2
1899	4,909,566,840	169,239,844	03.4
1900	5,565,669,701	307,751,296	05.5
1901	6,139,390,776	591,524,152	09.6
1902	6,231,714,558	989,908,977	15.8
1903	6,806,017,429	1,101,476,738	16.2
1904	6,640,482,483	906,938,130	13.7
1905	6,747,869,277	948,675,957	14.1
1906	7,147,548,312	1,051,558,221	14.7
1907	7,353,221,840	1,039,822,996	14.1

Note.—The above figures of the manufacture by The American Tobacco Company and subsidiaries were furnished by The American Tobacco Company; those showing total manufacture in the United States are from reports of Commissioner of Internal Revenue.

Appendix "N."

m Report Bureau of Corporations to the Senate on price of tobacco, June 5, 1909, p. 21.]

bined income of the various companies in the Tobacco Combination (excluding duplications), 1890–1907.

r.	American, Continental, and Lorillard companies.			American Snuff Company.	American Cigar Company.b	Grand total.
	Earnings of own business.a	Earnings of principal subsidiary companies.	Dividends and interest from companies not covered by preceding.			
....	$2,511,180.12	.....	.....	.....	.....	$2,511,180.12
....	4,396,794.93	.....	.....	.....	.....	4,396,794.93
....	4,739,301.65	.....	.....	.....	.....	4,739,301.65
....	4,334,467.34	.....	.....	.....	.....	4,334,467.34
....	5,065,493.61	.....	$3,922.36	.....	.....	5,069,415.97
....	3,917,908.78	.....	53,612.77	.....	.....	3,971,521.55
....	3,412,899.97	.....	180,297.02	.....	.....	3,593,196.99
....	3,996,115.21	.....	183,345.45	.....	.....	4,179,460.66
....	3,584,785.51	.....	232,983.29	.....	.....	3,817,768.80
....	6,473,726.65	$235,215.79	495,608.48	.....	.....	7,204,550.92
....	9,218,273.64	683,237.64	296,943.39	$531,667.92	.....	10,730,122.59
....	12,310,072.20	1,524,860.89	321,925.00	1,066,605.31	$157,259.65	15,380,723.05
....	15,744,700.21	2,470,699.59	1,129,374.73	1,739,616.84	*3,055,251.44	18,029,139.93
....	18,815,116.93	3,278,500.73	1,506,064.92	2,177,827.75	*1,223,232.40	24,549,277.93
....	16,229,579.36	4,905,610.18	1,912,885.53	2,458,419.37	460,329.54	25,966,823.98
....	18,347,881.30	5,715,046.58	2,820,500.07	3,232,809.70	1,330,225.27	31,446,262.92
....	20,856,677.48	6,638,629.75	2,383,496.41	3,808,333.62	3,032,378.86	36,719,516.12
....	19,246,729.78	8,151,145.06	2,776,133.71	3,539,048.92	2,287,098.28	36,000,155.75

Excluding business of American and Continental Tobacco companies as agents of the American Company for years 1902 to 1905, inclusive.

Including business of American and Continental Tobacco companies as agents of the American Company for years 1902 to 1905, inclusive.

Loss.

Appendix "O."

[From Report Bureau of Corporations to the Senate on prices of tobacco, June 5, 1909, p. 27.]

American, Continental and Lorillard companies—Separation of domestic from export profits.

Year.	Total Profits.			Distribution.		
	Total income from own business.	Miscellaneous profits or losses.	Departmental profits.	Domestic profits distributed to individual departments.	Export profits.	Amount undistributed
1890....	$2,511,180.12	$1,110.57	$2,510,069.55	.....	.....	.....
1891....	4,396,794.93	2,060.37	4,394,734.56	.....	.....	.....
1892....	4,739,301.65	4,759.29	4,734,542.36	.....	.....	.....
1893....	4,334,467.34	16,550.82	4,317,916.52	.....	$514,160.41	.....
1894....	5,065,493.61	17,261.56	5,048,232.05	.....	487,255.07	.....
1895....	3,917,908.78	15,208.18	3,902,700.60	$3,412,061.45	545,132.40	*$54,493
1896....	3,412,999.97	*162,972.49	3,575,872.46	2,823,478.86	824,101.95	*71,708
1897....	3,996,115.21	.....	3,996,115.21	3,207,032.97	811,344.95	*22,262
1898....	3,584,785.51	.....	3,584,785.51	2,664,191.64	1,010,233.15	*89,639
1899....	6,473,726.65	100,079.66	6,373,646.99	5,122,970.99	914,407.35	336,268
1900....	9,218,273.64	35,133.42	9,183,140.22	8,486,966.57	685,090.56	11,083
1901....	12,310,072.20	36,933.65	12,273,138 55	11,779,024.65	652,119.81	*158,005
1902....	15,744,700.21	27,037.23	15,717,662.98	15,587,866.27	37,727.50	167,524
1903....	18,815,116.93	45,136.64	18,769,980.29	18,735,888.85	2,706.59	36,796
1904....	16,229,579.36	148,496.08	16,081,083.28	16,007,402.49	.....	73,680
1905....	18,347,881.30	458,079.19	17,889,802.11	17,913,829.59	1,305.11	*22,721
1906....	20,856,677.48	171,604.86	20,685,072.62	20,641,708.06	341.03	43,023
1907....	19,246,729.78	233,424.90	19,013,304.88	19,025,726.27	170.24	*12,591

* Loss.

Appendix "P."

[From Report of Bureau of Corporations to the Senate on prices of tobacco, June 5, 1909, p. 43.]

Average prices and profits, by departments, of the Tobacco Combination (domestic business.)

[American Cigar and American Snuff companies not included.]

Year.	Smoking (per pound).		Plug (per pound).		Fine cut (per pound).	
	Price less tax.	Profit.	Price less tax.	Profit.	Price less tax.	Profit.
	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
1895	25.0	3.2	15.5	*4.4	27.0	4.3
1896	24.7	4.4	12.9	*4.4	27.2	3.6
1897	23.7	4.6	12.2	*2.4	26.6	5.5
1898	23.6	3.2	16.7	*2.8	25.9	*.9
1899	21.1	2.8	24.9	1.9	24.4	1.8
1900	22.8	4.5	22.8	3.7	23.0	*.7
1901	24.5	5.8	25.2	6.4	26.3	*1.9
1902	26 7	6.8	27.7	8.3	33.4	6.4
1903	27.9	6.2	29.4	9.8	29.4	5.8
1904	29.4	7.1	30.0	8.0	30.8	6.2
1905	28.4	8.3	30.2	8.1	30.6	6.7
1906	29.3	9.0	30.1	9.1	29.9	6.6
1907	30.1	9.3	30.4	8.7	30.0	5.3

Year.	Scrap (per pound).		Cigarettes (per thousand).a		Little cigars (per thousand).	
	Price less tax.	Profit.	Price less tax.	Profit.	Price less tax.	Profit.
	Cents.	Cents.				
1895	.....	.....	$2.77	$1.22	$4.60	$0.43
1896	.....	....	2.46	1.06	4.43	.41
1897	.....	.....	2.27	1.00	3.96	.67
1898	.....	....	2.02	1.05	3.68	.43
1899	.....	.....	2.01	1.05	3.27	.07
1900	.....	.....	2.09	1.05	3.19	.33
1901	13 2	.4	2.12	.97	3.34	.63
1902	15.2	*.3	2 29	.72	4.37	.20
1903	17.7	3.9	2.27	1.04	4.33	.39
1904	18.0	1.5	2.25	.91	3.91	.72
1905	17.7	.3	2.17	.89	3.59	.92
1906	18.0	*2.7	2.15	.85	3.60	.69
1907	18.5	*1.5	2.20	.71	3.60	.56

a American Tobacco Company only. * Loss.

Appendix "Q."

[From Report of Bureau of Corporations to the Senate, June 5, 1909, page 29.]

American, Continental and Lorillard companies—Net value of sales and proportion represented by tax, cost and profit, respectively (domestic business).

Year.	Amount represented by —				Proportion represented by —		
	Net value of sales.	Tax.	Cost.	Profit.	Tax.	Cost.	Profit.
					Per ct.	Per ct.	Per ct.
1895	$21,120,561.70	$4,071,055.14	$13,637,445.11	$3,412,061.45	19.3	64.6	16.1
1896	22,235,508.62	4,786,115.76	14,625,914.00	2,823,478.86	21.5	65.8	12.7
1897	23,485,333.81	5,859,836.87	14,418,463.97	3,207,032.97	24.9	61.4	13.7
1898	26,923,627.35	8,674,345.07	15,585,090.64	2,664,191.64	32.2	57.9	9.9
1899	61,920,705.44	21,582,820.74	35,214,913.71	5,122,970.99	34.8	56.9	8.3
1900	67,589,568.18	23,856,691.80	35,245,909.81	8,486,966.57	35.3	52.1	12.6
1901	67,147,552.13	20,737,075.29	34,631,452.19	11,779,024.65	30.9	51.6	17.5
1902	71,786,348.15	16,222,318.27	39,976,163.61	15,587,866.27	22.6	55.7	21.7
1903	71,704,514.23	12,962,499.45	40,006,125.93	18,735,888.85	18.1	55.8	26.1
1904	69,981,891.92	12,374,293.68	41,600,195.75	16,007,402.49	17.7	59.4	22.9
1905	78,261,513.01	12,992,612.42	42,355,071.00	17,913,829.59	17.7	57.8	24.5
1906	80,050,489.98	14,285,733.43	45,123,048.49	20,641,708.06	17.8	56.4	25.8
1907	79,604,641.91	14,557,284.72	46,021,630.92	19,025,726.27	18.3	57.8	23.9

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 316.

THE UNITED STATES OF AMERICA, APPELLANT, v. THE AMERICAN TOBACCO COMPANY AND OTHERS.

No. 317.

THE AMERICAN TOBACCO COMPANY AND OTHERS, APPELLANTS, v. THE UNITED STATES OF AMERICA.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ORAL ARGUMENT OF THE ATTORNEY-GENERAL ON BEHALF OF THE UNITED STATES, IN REPLY TO DEFENDANTS.

May it please the court: Prior to the year 1890 there were five concerns engaged in the business of manufacturing and selling cigarettes—a Virginia corporation, a North Carolina corporation, a New York corporation, and two partnerships. They were in active competition with each other. It was stated here in argument yesterday, and is shown in the record, that during the year 1889 one concern alone had expended upward of $800,000 in advertising. We are not left in any doubt as to the nature of the business which they were engaged in conducting; because, apart from the other evidence in the case, all of the defendants save the Imperial Company united in a stipulation of facts which your honors will find as Government's Exhibit 8, in volume 5 of the tran-

script of record. It was offered in evidence. The Imperial Company did not concur, but allowed it to be read, subject to any correction of any errors that might appear in the stipulation during the progress of the case.

On pages 2 and 3 of that stipulation, the nature of the business which these concerns were conducting was briefly and succinctly set forth; and it was that these five concerns—one in North Carolina, one in Virginia, one in New York City, one in Rochester, N. Y., and a partnership in New York City—were all "engaged in the manufacture of cigarettes and smoking tobaccos, in which each had established a successful business, and each, through its own agents, purchased its supplies where the requisite types grew, and advertised its products."

I read the next paragraph of the stipulation:

"That each of said concerns sold its products through its own traveling salesmen in States and countries other than those in which its said factory was located, by having said traveling salesmen take orders therefor, which, when approved, were filled by the goods being delivered to a common carrier where the factory was located, duly consigned to the purchaser, title passing to said purchaser on such delivery."

In the year 1890—the beginning of the year 1890—the dominant individuals in control of those five businesses, as the result of much negotiation, brought them together in one common holding, under the ægis of a New Jersey corporation organized for the purpose, and taking property with tangible assets of the value of about $3,500,000, capitalized the aggregate businesses at $25,000,000, distributed preferred and common stocks pro rata to those interested in the constituent concerns, and conveyed to this New Jersey corporation all the property and businesses of these concerns, thereby immediately, as appears by the evidence, acquiring 96 per cent of the entire business of the United States in cigarettes, and a considerable portion of the business in smoking tobacco. When the Sherman Anti-trust Act of 1890 was passed it found this combination, with those who had formed it and who controlled it and were then operating it, combined and conspired to effectuate what they had begun—the complete monopoly of the cigarette business of the United States of America.

From this comparatively small beginning, which my friend, Mr. Nicoll, says was a "simple, typical case" (and I accept his description, because it is accurate)—such simple, typical cases being repeated again and again during a period of almost twenty years—you have now before the bar of this court a combination which controls 80 per cent of the entire production of the United States in little cigars, 74 per cent of cigarettes, 70 per cent of smoking tobacco, 87 per cent

of plug and twist tobacco, 80 per cent of fine cut, 95 per cent of snuff, and about 14½ per cent of cigars; besides 95 per cent of the entire business of the United States in the manufacture of licorice paste, an indispensable ingredient in the manufacture of certain classes of the products of tobacco; and you have also a control over such incidental products, almost equally essential, as tin foil, boxes, containers, holders, etc., and you have a control, through the ownership of two-thirds of the capital stock, of the entire export business, substantially the entire export business in tobacco products from the United States to countries other than the government monopoly countries and Great Britain, in the hands of a corporation organized for the purpose under contracts made in Great Britain.

Moreover, this combination during the year 1907 purchased about 45 per cent of the entire crop of leaf tobacco grown in the United States of all kinds, and of certain types, such as the flue-cured tobacco of Virginia, North Carolina, and South Carolina, it purchased nearly 60 per cent of the whole amount produced, of burley tobacco, nearly 72 per cent of the whole amount produced, and of sun-cured tobacco about 90 per cent of the amount produced.

The statement of the growth of this combination is perhaps as well set forth in the answer of most of the defendants themselves, printed in the first volume of the record at page 259, as in any other place. It is there said:

"The American Tobacco Company has been a successful and growing corporation engaged in the tobacco business; its officers and employees have been practical tobacco men; investors in its securities have had confidence in its management. These officers and employees have kept in touch with the tobacco trade and have given study to the tobacco business; they have made investments of the money of the security holders of the company from time to time in tobacco brands, not with a view of lessening the competition against the brands already in existence, and not with a view of monopolizing the business, but because the tobacco business was the business in which they were engaged, the business which they were best capable of running, and the business of whose value they were best able to form a judgment when about to make an investment"——

They go on with a description, setting forth the essential facts, and putting upon them the color which from their standpoint would naturally be expected.

The total income of this combination for the year 1907 was $36,000,000. So that you have before this court now one of the greatest combinations of capital; one of the greatest aggregations dominating a great industry of the country that has ever been brought to the bar of this court under the Sherman Act.

A question for this court to consider, and which I approach with all the seriousness which the subject demands, is whether such a

combination can be maintained in the face of the express prohibition in the act of Congress, or whether that act of Congress is competent to reach and to control and to split up that monopoly.

Judge Coxe, in the court below, in his opinion described this combination in the following language:

"The Tobacco trust, so called, consists of over 60 corporations, which, since January, 1890, have been united into a gigantic combination which controls a greatly preponderating proportion of the tobacco business in the United States in each and all its branches, in some branches the volume being as high as 95 per cent. Prior to their absorption many of these corporations have been active competitors in interstate and foreign commerce. They competed in purchasing raw materials, in manufacturing, in jobbing, and in selling to the consumer. To-day those plants which have not been closed are, with one or two exceptions, under the absolute domination of the supreme central authority. Everything directly or indirectly connected with the manufacture and sale of tobacco products, including the ingredients, the packages, the bags, and boxes, are largely controlled by it. Should a party with a moderate capital desire to enter the field it would be difficult to do so against the opposition of this combination. That many of the associated corporations were not coerced into joining the combination but entered of their own volition is quite true, but in many other instances it is evident that if not actually compelled to join they preferred to do so rather than face an unequal trade war in which the odds were all against them and in which success could only be achieved by a ruinous expenditure of time and money. * * * Since 1900 this vast interstate and foreign trade, which was formerly carried on by this large number of competing companies and individuals, is now carried on by one combination. The free interchange of commerce has been interfered with, hampered, diverted, and in some instances destroyed. Though it may be greater in volume, it does not flow through the old channels; it is not free and unrestrained."

Judge Noyes in his opinion makes a statement which is an equally striking deduction from the evidence in the case. He says, at page 316 of Volume I of the record:

"The hold of the defendants upon the tobacco industry of the country has steadily increased since the formation of the combination. There is only one branch of the industry which they do not have within their grasp—the cigar branch; but their predominating interest in all of the other branches is not lessened by the fact that they have not, as yet, obtained control of this branch."

And again:

"Subject to the economic limit that prices can not be fixed so low as to deprive the grower of inducement to raise future crops, the extent of the defendants' purchases of tobacco leaf necessarily gives them large power to fix the prices to be paid for the types which they require. Prices may be regulated, as the defendants assert, by the

law of supply and demand, but the difficulty here is that the demand for many types comes, practically, from only one source. To whom, for example, can the growers of Burley or Virginia sun-cured tobacco sell their crops if they refuse the prices offered by the defendants?

"Similarly, the production by the defendants of by far the greater part of the tobacco used in this country gives the power to control the prices of the manufactured article, subject to the economic limit that if placed too high the consumer will give up the use of tobacco. It is not a question of going to another producer. No other producer could supply the amount required. Where will the users of snuff obtain it if they are unwilling to pay the prices charged by the defendants?

"Moreover, the defendants possess an even greater power over the prices of raw materials and finished products than the statistics which we have noted indicate. It is apparent from the record that they are the dominating factors in the tobacco industry. Other producers are scattered and do not act together. They are not in a position to initiate price making. They must follow the action of the defendants."

Now, the defendants challenge the accuracy of these statements, and deny the justice of the decree rendered. The court below, as has been pointed out, adjudged that the American Tobacco Company and its principal subsidiary companies, those controlling these great lines of separate tobacco product industries, such as snuff and chewing tobacco and plug and twist, and licorice paste, were each of them, in and of itself, combinations in restraint of trade, and it enjoined them from participating in interstate commerce until they should restore reasonable competitive conditions. It, moreover, enjoined the American Tobacco Company from the beneficial ownership of, or from participating in, the control of the great mass of corporations whose stocks it had acquired in the manner set forth in the bill.

The defendants challenge the accuracy of that decree, or the justice of those characterizations upon substantially these grounds, as I understand them: They say first that the business which is complained of here was not interstate commerce, and on that point they plant themselves on the Knight case; and they say that they have not and do not constitute a monopoly. The court below did not adjudge that they were within the second section of the act. The court below chose to put its judgment exclusively upon the provisions of the first section of the Sherman Act; and finding them to be severally combinations in restraint of trade, said it was not necessary to consider the full effect of the second section and to adjudge the defendants guilty of monopolizing or attempting to monopolize interstate commerce. The defendants say that what they have done has been simply to purchase property from time to time, protecting themselves by restrictive covenants such as this court and other courts have held to be entirely proper to secure to themselves the beneficial effects of that

which they paid for; and that, buttressed by the laws of the States under which they have been organized and under whose laws they have acquired title to this property, they can defy the federal law; because they are not, within the purview of the things of which complaint is made, conducting interstate commerce.

Therefore the first consideration is whether the facts alleged and proved here show that these defendants were or were not engaged in interstate commerce with respect to those things which are embraced in the petition, and which were the subject of the decree below.

On that point we are again not left to conjecture, because in the same stipulation to which I referred a few moments ago, Government's Exhibit 8, at page 31 of the fifth volume of the record is the following stipulation:

"We admit that all the vendors and corporation defendants mentioned in the petition as engaged in the manufacture and sale of tobacco products"——

And that is practically all of them——

"Except Imperial Tobacco Company (Limited), purchased or now purchases some or all of the requisite raw material in States or countries other than those in which the factories were or are located, and had or has it transported thence through the medium of common carriers to said factories, and employed or employ traveling salesmen who solicited or solicit in States or countries other than those in which the factory was or is located, orders for the tobacco products which by them were or are transmitted to said factory or other chief office of the manufacturer, and, if approved, they are filled by the delivery of the goods to a common carrier where the factory was or is located, duly consigned to the purchaser, title passing to said purchaser on said delivery to the common carrier."

My learned friends on the other side ascribe great weight to the clause in the stipulation to the effect that the title to the goods, orders for which are solicited in this way in foreign States and countries, for the sale of the manufactured products of tobacco brought from 20 different States to 20 other different States, passed to the purchaser on delivery to the carrier at the particular place of manufacture, to sustain the contention that they are not within the field of interstate commerce.

On this point Judge Coxe in the court below made this pertinent observation. He says:

"It may be true that there are individual members of this combination not engaged in interstate commerce—manufacturing companies merely—and, therefore, not engaged in commerce within the rule enunciated in United States *v.* E. C. Knight Company (156 U. S., 1). But here the complaint is made, not against the individual conspirators separately, but against the combination as a whole. Has it monopolized or restrained any part of interstate or foreign

commerce? If so, it would seem that it is liable under the act. To illustrate: A is a manufacturer of tobacco in New York; B is a buyer of raw material in Kentucky; C is a jobber in Pennsylvania; and D is a retailer in Boston. B sends the leaf tobacco from Louisville to New York. A manufactures it into smoking and chewing tobacco, and sends it to C at Philadelphia, who in turn ships it to D at Boston, who sells it to the public. Should A, B, C, and D enter into a copartnership to do as a firm what they have hitherto done as individuals, can there be a doubt that the firm would be engaged in interstate commerce."

Judge Coxe then referred to the admission which I have just read to your honors in the stipulation, and said:

"If the contention of the defendants, that this does not constitute interstate commerce be correct, then it would seem to follow that no one can be engaged in such commerce unless he be a carrier, common or private, between the States * * *. In other words, although the so-called 'Tobacco trust' is buying raw material and selling its completed products in the markets of the world, it is not engaged in 'trade or commerce among the several States or with foreign nations,' because carriers are employed to convey the goods from State to State and to foreign countries. I can not but think that this is too narrow a construction * * * ."

Judge Noyes, in the court below, after rehearsing the facts, said:

"They clearly show traffic between citizens of different States and the purchase, sale, and exchange of commodities across state lines to show that the defendants are directly engaged in commerce among the States and the subject to the federal antitrust statute. * * * A point is made that this combination did not engage in interstate commerce in respect of sales made by traveling salesmen, because the title to the goods sold passed to the consignee when delivery was made to the common carrier in the place of manufacture. But the defendants engaged in interstate commerce when they sent their salesmen into different States and accepted and filled the orders obtained."

This selling business is a little more fully described by Mr. Hill, vice-president of the American Tobacco Company, in the testimony in the second volume of the record. At page 103, in the first place, Mr. Yuille says that they have a committee, and that the execution of what they conclude to do in the southern field in the purchase of leaf is intrusted to him, and that he is a member of the committee. He says:

"We give our buyers an idea of about what average we want to pay for a certain grade of tobacco. We instruct them to buy a certain grade of tobacco at about an average price;"

and that the American Tobacco Company has a representative purchasing tobacco in substantially every tobacco market in the United States.

Mr. Hill says, at page 204, that there are four selling departments, in charge of two men, who, in their turn, have their salesmen under

them. He is speaking now of the general selling of everything but plug tobacco and its product. He says, at page 203:

"The four departments are Duke's Mixture department, the long-cut and little cigar department, the plug-cut department, and the cigarette department. And each one of these is in charge of two men, one of whom is supposed to be in New York constantly and the other out among the salesmen, alternating their positions from time to time, and these two men formulate schemes and plans and devise methods of advertising the different brands and employ salesmen to look after the products under their control throughout the country.

"Q. Have these men under them salaried agents who are either traveling or stationed in all the cities or States of the Union?

"A. Well, for instance, you take the long cut and the little cigar department, they would not have men in all the States of the Union, for the reason that that class of goods is not sold in every State.

"Q. But in most of them I presume it is?

"A. The country is scattered over with salesmen representing either one or more of these departments.

"Q. In every State or important locality?

"A. Yes, sir.

"Q. And you either have salaried agents or men traveling in all these places?

"A. Yes, sir; the men in the ordinary course of business solicit orders and secure orders and send them in for the goods.

"Q. And do those orders come to your department?

"A. They come to those departments I have mentioned, but not directly to me."

Mr. Dula, the vice-president in charge of the plug business, testified in the same volume, at page 465. He was asked how many men there were in his plug department, directly employed by the American Tobacco Company, and he said that they usually ran from 250 to 330 or 340.

"Q. And those men are scattered about through the different States of the Union doing the character of business about which you have told us?

"A. Yes.

"Q. What, generally speaking, is your method of distributing your plug tobacco? Do you go directly to the retailer or do you distribute it to the wholesaler?

"A. Our policy is to sell through the wholesaler, but there are exceptions. In some places we sell the retail trade direct because there are so few jobbers to distribute it.

"Q. Have you a uniform price for the sale of your plug products throughout the United States?

"A. We have, excepting a divisional line between the West, where the freight is so much higher; we add more out there.

"Q. Do you sell these goods at the same price, excluding for the present this freight consideration, to all parties, to all the jobbers to whom you sell at all, in all the States of the Union?

"A. We have a different discount. Our general discount on plug at the present and for some time has been 7 per cent from the face

of the bill, but in the New England States it has been 8 per cent from the face of the bill and 2 per cent for cash. That 2 per cent for cash applies everywhere.

"Q. Is it your rule to bill these goods freight paid up to the point of destination?

"A. Yes, sir.

"Q. Where are they shipped from?

"A. They are usually shipped from the factory where they are made.

"Q. These men in the field who are taking orders send them to the jobbers, or the jobbers otherwise obtain them and then the orders for the goods are sent in to your department at 111 Fifth avenue, New York, are they not?

"A. Not these particular orders; but the jobbers send their orders in to us for goods.

"Q. That is what I mean. The jobbers send their orders to 111 Fifth avenue, and then the goods, through the department at the general office, are ordered shipped out from wherever they happen to be manufactured?

"A. Orders are issued on the factory where they are made usually.

"Q. And those factories are located at perhaps a dozen places throughout the United States?

"A. There are several places."

Without entering into an enumeration of all the authorities which are recited in the respective briefs bearing upon the definition of what constitutes interstate commerce, which Mr. Justice Peckham (in the Hopkins case, 171 U. S. 578–597) said was a definition not easily given so that it would clearly define the full meaning of the term; it is sufficient to point out, as Mr. Justice Holmes said in the Swift case (196 U. S. 375, 398), that—

"Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."

The case of United States *v.* E. C. Knight Company (156 U. S. 1) is the great bulwark of the defendants, under which they, in effect make their last stand.

Mr. Johnson's first point was that this case is ruled by the Knight case, which he characterized as "the bulwark of state control of state matters."

Therefore it becomes necessary to enter upon a rather nice analysis of the Knight case, to see how far, if at all, it does apply to this controversy.

The petition filed in that case attacked certain contracts made by one Searles on behalf of the American Sugar Refining Company for the purchase of four separate refineries in the city of Philadelphia. It is almost an impertinence to rehearse to this court the facts or the doctrine of that case; but the fact is that the scope of that bill was so narrow, and the averment of facts restricted to such a small compass, that it presented, as the majority of the court found, simply

this question: Whether or not, under the Sherman Act, the Government could maintain a bill for a rescission of contracts of sale and purchase of four manufactories in the city of Philadelphia, because by the acquisition of those manufactories the purchaser secured 96 per cent of all the manufactories of sugar in the United States. Judge Butler, in dismissing the bill in the circuit court, said:

"The contracts and acts of defendants relate exclusively to the acquisition of sugar refineries and the business of sugar refining in Pennsylvania. They have no reference to and bear no relation to commerce between the States or with foreign nations * * *. It is the stream of commerce flowing across the States and between them and foreign nations that Congress is authorized to regulate. To prevent direct interference with or disturbance of this flow was the power granted to the Federal Government."

Upon this finding of fact, the bill was dismissed, and on appeal a majority of this court approved of the action of the trial judge, and treating the whole question to be whether, conceding that the execution of these contracts, and the conveyance to the American Sugar Refining Company pursuant thereto of the four refineries embraced therein, would give the sugar company a monopoly in manufacture, held, that such monopoly could not be directly suppressed under the act of Congress, in the mode attempted by the bill; because, while the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, this is a secondary, and not the primary, sense, for although the exercise of that power might result in bringing the operation of commerce into play, it did not control it, and affected it only incidentally and indirectly.

"There was nothing in the proofs," said the Chief Justice, in writing the opinion of the court, "to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be directly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed, and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; * * *" (156 U. S. at p. 17.)

The decision in that case, as is seen, turned upon a pure question of fact. Of course, a decision upon a question of fact binds neither the court nor anyone else in any subsequent case arising out of different facts. *The proposition of law involved* was that the States were left by the Constitution to the exercise by them of their police power over persons and property within their borders, while the Constitution gave to Congress the exclusive power to regulate commerce among the States. The Chief Justice drew the distinction very carefully.

"The regulation of commerce," he said,

"applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce.

"There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be directly affected was not enough to entitle complainants to a decree."

That was the pith of the whole decision; and on the findings of fact, assuming the correctness of these findings of fact, no other conclusion could have been reached.

Mr. Justice Harlan dissented, drawing a different inference from the same facts. His inference was that a broader conclusion was required and that the acts of the defendants should be regarded as indicating a distinct intention to monopolize interstate trade and commerce in sugar. That view of the Knight case has been taken wherever it is spoken of in any of the subsequent decisions of this court.

Thus, Mr. Justice Peckham, in the very next case that came up, the Trans-Missouri case (166 U. S., 290), said:

"We have held that the trust act did not apply to a company engaged in one State in the refining of sugar under the circumstances detailed in the case of United States *v.* E. C. Knight Company (154 U. S., 1), because the refining of sugar under those circumstances bore no distinct relation to commerce between the States or with foreign nations."

And in the Addyston Pipe case (175 U. S., 211, 240), the same justice said:

"The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar"——

did not supply that needed proof.

In the Northern Securities case (193 U. S., 197), Mr. Justice Harlan, writing the prevailing opinion, said of the Knight case:

"That the agreement or arrangement there involved had reference only to the manufacture or production of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce it would then have been covered by the antitrust act and would have been illegal."

And Mr. Justice White, in his dissenting opinion, referred to it in this language:

"Take the Knight case; there, as the contract merely concerned the purchase of the stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held, as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might thereafter so act concerning the product as to burden commerce there was no direct burden resulting from the mere acquisition and ownership."

In the Swift case (196 U. S., 375) Mr. Justice Holmes referred to the Knight case and said that the case at bar was not like the Knight case—

"where the subject-matter of the combination was manufacture and the direct object, monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales."

In Loewe *v.* Lawler (208 U. S., 274) this court said:

"We do not pause to comment on the cases such as United States *v.* Knight" [and two or three others] "in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce."

The nearest case that I know of in the books, in its facts, to the Knight case, is the decision of the circuit court of appeals in the sixth circuit, in which his honor Mr. Justice Lurton wrote one of the opinions—the case of Bigelow *v.* Calumet and Hecla Mining Co. (167 Fed. R., 721). There suit was brought by a stockholder of a mining company of Michigan to restrain another mining company of the same State from voting on the stock of the first-mentioned company held by the second, and by a separate bill to question the legality of a purchase by the defendant mining company of additional copper-producing lands in Michigan, claiming that the purchase of the stock and lands was void as a restraint of trade and an attempt to monopolize, contrary to the antitrust law. The bill was dismissed at circuit, and that action was affirmed in the circuit court of appeals, upon the ground that the acquisition challenged in each case was not interstate commerce, and did not directly, immediately, or necessarily operate as a restraint of commerce among the States.

"The Knight case, in its last analysis," said Judge Lurton in writing the opinion of the court, "is but a striking illustration of the rule that the monopoly or agreement to come within the act must directly and immediately affect interstate commerce. Confining the case to its facts, it establishes the proposition that a mere combination between manufacturers only, by which a monopoly of product results,

is not, without other special circumstances, sufficient to justify an active intervention under the act to undo a contract by which such monopoly has been brought about. That the product thus monopolized by such combination of mere manufacturers may ultimately find itself into the stream of interstate commerce is there held not to be such a special circumstance as to constitute the direct and immediate effect upon commerce among the States as to bring the agreement within the act."

The court reviewed the facts in the case, and said:

"When all is said that the facts justify, the acquisition of the voting power of a majority of the capital shares of the Oceola Consolidated Mining Company and its proposed exercise by the selection of a board, a majority of which to be composed of the members of the board of the Calumet and Hecla Company, is the main fact upon which the complainant must invoke the prohibition of the act of Congress. That fact is not enough. That the two companies are in a sense competitors, and that the product of their mines will ultimately go into interstate commerce, is far from making out a case of direct or necessary and immediate interference with that kind of commerce. They do not show that even a monopoly of the product will ever probably ensue, to say nothing of the utter absence of any material evidence indicating that such a monopoly in the product of two contiguous mining companies would directly or necessarily affect commerce among the States. No express matter is shown by which anything is to be done or left undone from which an unlawful restraint must, or will, probably happen."

After pointing out that the power of stock control which the defendant had acquired was not enough to bring the case within the act, he added:

"On the other hand, that power may be a mere preparation for the doing of acts which will directly and necessarily interfere with the freedom of that kind of commerce which it is the purpose of Congress to protect. When this unlawful use of the power shall result in an unlawful restraint, or further steps shall point to results directly affecting such commerce, there may be interference by the courts."

Now, in the Knight case, Chief Justice Fuller said:

"The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce."

In the Northern Securities case, the court said (at pages 337–342, 352):

"The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce. * * * The means employed in respect of the combinations forbidden by the antitrust act, and which Congress deemed germane to the end to be accomplished, was to prescribe as a rule for

interstate and international commerce that it should not be vexed by * * * monopolies which restrain commerce by destroying or restricting competition * * * and all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends * * * to every device that may be employed to interfere with the freedom of commerce. * * * We need only say that Congress has authority to declare and by the language of its act, as interpreted in prior cases, has in effect declared that the freedom of interstate and international commerce shall not be obstructed or disturbed."

In subsequent cases care was taken to point out that the act was violated and commerce would be treated as restrained wherever a combination was found to exist which had *the power* to suppress competition and restrain trade.

In the Northern Securities case, among the propositions which Justice Harlan, in the prevailing opinion, states could be plainly deduced from the former decisions of the court, was this:

"That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition." (p. 332.)

It was the power of the combination to restrain trade and stifle competition which led to its condemnation in the Northern Securities case. In the Harriman case (197 U. S. 244), the chief justice said, with respect to that Northern Securities case:

"Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was."

In like manner, the fact that the defendants have been permitted to consolidate or merge corporations under state laws has no bearing whatever, and can not be erected as a barrier against the power of the National Government under the act of Congress to say that they shall not use that tenure of title for the purpose of maintaining or creating a restraint of trade. Their tenure is not challenged. The validity of their incorporation, of their consolidation, of their merger, is not questioned. The ownership of their property is not sought to be interfered with; but the Government says that by these things, valid in themselves, they have created a combination amounting to a monopoly, which interferes with the free and unrestrained course of commerce among the States or with foreign countries, and that it must be stopped.

The real question, as was said by the chief justice in the Knight case, is, therefore, whether or not the contract or combination attacked tends to deprive the public of the advantages which flow from free competition; for, it makes no difference, as has been decided by this court, how the obstruction is created, or what the nature of the obstruction is—whether it be, as Attorney General Knox said in the Northern Securities case, "a mob, a sand bar, or a monopoly." In whatever form it arises; when your honors find an obstruction to the free flow of commerce and trade among the States, whether in the nature of a contract, combination, conspiracy, or monopoly, it is the duty of the court to strike it down.

The conclusion reached in Loewe v. Lawlor, —— the Danbury Hat case, was put by the chief justice upon "many judgments of this court to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business."

What the Government attacks, and what the court below decreed to be illegal in the case at bar, was not the mere acquisition by one manufacturing company of other manufactories within a State; but it is a combination, composed of sixty-odd separate corporate entities, and a great number of individuals, spreading its tentacles to the remote parts of the United States and its possessions, and into foreign countries; purchasing raw material in a dozen States, shipping that material into other States where it is made up into various commercial products which are then sent for distribution to different distributing agencies in various States, pursuant to orders obtained by its many agents in every State and Territory of the Union. It is the control of *this* business; the domination of trade and commerce in the products of tobacco amounting to millions of dollars in value and to enormous proportions of the entire commerce of the country in such articles, which gives to this combination the absolute control of the business, and a power, which may be exercised or not at the will of those in control of the combination, which constitutes a restraint of commerce among the States, and demonstrates the fact that the defendants are monopolizing or attempting to monopolize the entire trade and commerce of the United States between the States and with various countries in tobacco and its manufactured products.

Take, for example, as instances of the way in which this combination actually does operate, two letters in Volume II of the record. At page 256 there is a letter addressed by Vice-President Hill of the American Tobacco Company to a Mr. Cobb, who was the president of the American Cigar Company:

"My Dear Mr. Cobb: At Mr. Duke's suggestion"——

Mr. Duke was the president. Mr. Duke is the great guiding intelligence of the whole combination. He was touchingly referred to yesterday as a second Warren Hastings, because, like Warren Hastings, he is amazed at his own moderation, when he thinks of the extent of his power, and what he really might have done.

Now, what is Mr. Duke's suggestion?

"At Mr. Duke's suggestion I write you to the effect that a plan has about been decided upon which differs from the one that was being considered before you left, and, as in carrying out this plan it will be undesirable to give control of any brands to individuals in any part of the country, Mr. Duke requests me to write you explaining it, so that in case any of our customers go to Habana you will not promise them control of any special brand. Mr. Rothschild, of the Waldorf-Astoria, will go to Habana to-morrow, Saturday, and we understand he will try to make arrangements to secure other Habana cigars than ours."

Rash Mr. Rothschild!

"Mr. Duke's idea is to make a confidential arrangement with the Messrs. Park & Tilford and Acker Merrall & Condit by which they will sell Habana cigars both to the consumer and the retailer at present cost, so that the retailer will be paying exactly the same price as the consumer. Of course, it will be necessary to keep this matter entirely confidential. The result will be a demoralization of the business for such length of time as may be deemed desirable to continue on this basis."

This is another one of these "typical transactions."

"The final upshot will be that the importers will be forced into an arrangement by which they will maintain prices agreed upon. This plan is considered the more desirable at this time for the reason that if we try to regulate the profit at the present time it would mean an advance in our goods to both wholesaler and retailer, which would give a decided advantage to independent factories in securing business, but we feel that when our goods are sold to the consumer at present cost there will be no opportunity to get much business for independent factories. Mr. Duke expects to have an interview with Messrs. Park & Tilford to-day to ascertain if this plan will be carried out by them. Will you kindly extend my regards to Mrs. Cobb and your daughter, and remember me to all of our folks in Habana, and, with sincere regards for yourself, believe me,

"Yours, very truly, Percival S. Hill."

Now, one other letter from Mr. Dula, which will be found at page 549. He is another of these vice-presidents, these inconsiderate people arising sometimes to the dignity of vice-presidents, to whom one of counsel referred in his opening.

At Page 549 of the record Mr. Dula writes to "Dear Middleton." "Dear Middleton" was in charge of one of their enterprises.

"Dear Middleton: I notice from the reports of our salesmen in Kentucky that both 'Index' and 'Dipper' are making some head-

way in the 'Star' or sweet goods sections, which is due, I think, to the fact that the jobbers are charging a pretty high price for 'Star,' while the manufacturers of the two brands named are offering very liberal inducements to the retailers to push their brands. There is a wide difference therefore in the cost to the retailer between 'Star' and the other brands which doubtless is causing them to discriminate in favor of the opposition. It has occurred to me that it would be well for you to put on an extraordinary deal on 'Uncle Sam' in Kentucky and put two or three good salesmen out after the business. I understand 'Dipper' is sold with a gratis of 2 pounds free in 12 pounds, and if you go in to make a fight I think you should do at least as well. I know your feeling about making money, but should you enter into a campaign of this kind and thereby somewhat reduce your profits the cause will be well known at this end of the line and there could not possibly be any criticism. Anyway, I would be willing to bear the brunt of that. As you know, we are making a pretty vigorous campaign both on plug and 'Scrapno' in the scrap territory, viz, Michigan, Indiana, Ohio, and Pennsylvania"——

These local manufacturing concerns, which come within the four corners of the Knight case——

"and the results thus far obtained are very gratifying. Just recently Scotten has become very active on 'Yankee Girl' plug 3 by 12, 20 ounces, 4 space, which he sells at 26 cents per pound, less 10 per cent and 2 per cent, with varying deals. This brand seems to be doing very well, and I think is helping our fight against scrap tobacco. While I am glad to have help in the fight against scrap, I would very much prefer to see the result of that help going to brands in which we have a larger interest than we have in Scotten's, and therefore I would suggest that you consider getting out a similar piece of tobacco and jump into the fight just a little bit stronger than Scotten is doing."

There is some more of that. Those are read simply for the purpose of illustrating the methods adopted by the defendants and the means which are open to them to carry them out on a large scale.

Now, in my view, the whole argument of the defendants is based upon a misinterpretation of the evidence in the case. It gives to that evidence a construction which is not warranted. It seeks to confine the controversy to a consideration of the purchase of the property of one manufacturing company by another. It argues, what is not disputed, that under the laws of the different States referred to, power is given for the formation of corporations for the purposes of manufacture, to acquire property, and to consolidate and merge corporations. All of this is perfectly true, but it does not answer the case made by the Government upon the evidence presented. What the Government points to is a combination effecting its purpose under a variety of forms, reaching out and controlling the entire trade and commerce in tobacco throughout the United States, and effecting this control by divers and sundry methods, all shrewdly

selected as appropriate to the main purpose, which, despite disclaimer, eloquently proclaims itself throughout the entire history of this great combination—namely, to secure a monopoly of the tobacco business in the United States and between the United States and foreign countries.

The five concerns which were organized in 1890 were admittedly in competition. I say "admittedly" because the *facts* are admitted, and the conclusion is irresistible that they were in competition, with each other, in interstate and foreign commerce. When they were combined they were an unlawful combination. The Sherman Act came into existence and found that unlawful combination. That combination has been extending from that time on, acquiring first one and then another competing business; reaching out its control, ever widening, widening, widening its sphere of operations, until it has secured absolute control of this enormous industry.

What have they done? They cite cases supporting, as the cases undoubtedly do support, the perfect legality of selling property with a covenant by the vender not to destroy the value of the property which he sells; but they have bought companies when they have not taken a covenant from the vender at all. They take an extreme covenant from every member of the board of directors, and from the principal stockholders besides. This record shows a systematic tendency, a repeated system of acquiring competitors, buying their properties, buying their stock, buying anything that they can get in order to secure their control.

The fact of the acquisition of control is admitted, and the motive alone is denied. Let us see about the motive. It speaks for itself eloquently. Take, as an example, two pieces of evidences in volume II, at page 316:

"'DEAR MR. HILL'"——

This was Mr. Hill, the vice-president——

"'DEAR MR. HILL: Your favor of the 16th instant recd., with inclosure, which I return herewith. I have just returned from a little western trip looking after our tobacco interests. We have put our forces to work in St. Louis again and think we can get some more of the business of "Orphan Boy." I am sending you a list of jobbers who must be made to feel, in some proper way, that it is not offensive to you to handle M. Q. You will know best how to do this.'"

If he did not, nobody did!

"'When you see Mr. Neudecker of Baltimore, please explain to him not to make the impression upon his trade that the R. T. Co.'"——

That is, the Reynolds Tobacco Company——

"'belongs to the trust.

"'Yours very truly, B. L. DULANEY.'"

Now, that is Mr. Hill.

Again, at page 319. This is a longer letter, a letter addressed to Mr. Hill by Mr. B. L. Dulaney, from Bristol, Tenn.:

"DEAR SIR: Until the receipt of your letter of the 16th instant I had refused to entertain any suggestion to the effect that you have not been treating our company fairly, and I still regret very much to be forced to believe it.

"You complain of not being able to see me, when you certainly know that when I was in New York, a week or so ago, I visited your office three days consecutively, and on one day waited all the forenoon, without being able to see you; and there was no fact in connection with our sale to you more clearly set out than that I could not and would not give this business any considerable part of my time. And yet I have been forced to give it much more thought and attention than ever before; and, if I understand your position now toward us we are simply in the attitude of a prisoner in chains with mock instructions to do the impossible."

There never was a better description on earth of the plight of these so-called controlled companies, full and complete evidence of which you will find in this record, that they were in the plight of prisoners in chains, with mock instructions to do the impossible. That is the competition they were instructed to carry out.

"You promised to buy our leaf and furnish it to us at the same price you do to the A. T. Co.—at cost and carriage. But the two shipments made us have been of such quality and price as to offer no encouragement.

"You promised us an open market for our product—that you would remove all opposition to our brands by your salesmen and the distributing houses with whom you had influence; but you have not done this.

"In Greater New York and New Jersey we had a good business, which has been taken away from us, by the argument that 'May Queen' had been bought by the trust and would soon be taken off the market.

"In Baltimore and Washington your salesmen have not ceased to intimidate the distributors, and have run us out by threats that 'houses which handled May Queen could not get the benefit of the trust's trade discounts,' and this same method has been practiced at many other places.

"Such tactics are like abusing a prisoner and would not be tolerated by the military regulations of any civilized country.

"In the West we have fought your battles as well as our own in appreciation of the 2-cent bonus you give us, fully believing that you appreciated and understood that in such a fight we could not expect to come out even.

"Now, as to the new brand, 'Union Lad.' Everything in connection with it has been done under your direction, even to the matter of furnishing us $500 second-hand machinery at $2,500.

"I don't want to think you are trifling with us, and yet I can not understand why you verbally order something done, and when it is done then write to know why it was done.

"Now, Mr. Hill, let us deal frankly with each other; and if it is your intention to put our company out of business, let us do so amicably and save every dollar possible to the stockholders.

"But if you want us to go on and succeed, break the shackles and give us a fair show, for the young men in charge are faithful and competent and will succeed if you will let them.

"Yours very truly,

"B. L. DULANEY."

I do not care whether Mr. Dulaney's complaint was true or not. I do not care whether what he said was true or not. I read it not as proof of the fact, but as proof by illustration of the power in the hands of this combination, and of the method by which they might exercise that power. I say if they did not exercise it it was only because, like that Warren Hastings, of whom Mr. Johnson says Mr. Duke is an example, they were amazing themselves with their own moderation.

Now, let us take up the question of the purchase of raw materials. Something has been said about that, and perhaps a word on that subject will illustrate the situation, and then it will not be necessary to spend any more time in this oral argument in a description of the methods pursued by the defendants.

At page 131 of the Government's brief there are printed some facts on that subject. In the answer of the defendants they say:

"The presence or absence of any given amount of competition in the purchase of leaf tobacco can have no permanent effect on the prices paid for such leaf tobacco. If there were an absolute monopoly in the purchase of leaf tobacco, a fair price would have to be paid or the land would go into these other crops; and if by many competitors bidding for leaf tobacco or otherwise, more than a fair price should be paid, there would result the growth of an oversupply of tobacco, which oversupply could only be stopped by a reduction in the price. Therefore, the American Tobacco Company has never had the slightest interest in eliminating competition in the purchase of leaf tobacco, and in those cases where it has bought for other manufacturers, or had other manufacturers buy for it, it has been actuated only by a desire to make more efficient and economical the organization for buying, and not at all the withdrawal of competition."

That is the position taken in their answer. And what are the facts shown in evidence?

Mr. Yuille (volume II, record page 103), whom I referred to in passing a few moments ago, was the vice-president of the company, and he was one of the committee who had to deal with the purchase of leaf tobacco; and this is the way the committee performed its functions.

He testified:

"I might say that the committee has charge of the entire operating end of the business.

"Q. And the execution of what they conclude to do in the southern field in the purchase of leaf is entrusted to you?
"A. Yes."

Again:

"Q. The season is about to begin, and you are to determine how much tobacco you want and how much you are going to buy; how is that arrived at?
"A. In August we have a pretty good idea of the size of the crop.
"Q. How do you get it?
"A. From our people in the field, and we go on weather conditions and planting. We keep up with it from the time it is planted and we have a very good idea of what the crop will yield. Then we take into consideration the amount of tobacco that is available in the markets and our own stock, how much supply there is behind us, and the possible supply in front of us, and then determine what we shall do.
"Q. How about the price that you are going to pay?
"A. We give our buyers an idea of about what average we want to pay for a certain grade of tobacco—there are many grades. We don't say how much tobacco; we have to give the instructions by grades.
"Q. Do you know, for instance, that your company needs so many pounds of Virginia sun-cured tobacco?
"A. Yes.
"Q. Now, you instruct your buyers in that field that you want so many million pounds of tobacco and want to pay, on an average price, about how much?
"A. Well, we don't instruct them how much we want.
"Q. What do you instruct them about, quantity?
"A. We instruct them to buy a certain grade of tobacco at about an average price of, say, about 11 cents, and we start buying at that average. If we see we are not getting our supply, we make a move to get more, and that is generally done by putting up the price.
"Q. If you are getting too much?
"A. If we get too much we make a move to put it down.
"Q. That is, put the price down?
"A. So far as our purchases are concerned.
"Q. Does that same general policy prevail throughout all the tobacco districts of the United States where you are in the market?
"A. Well, the whole thing is regulated on supply and demand, and I suppose so.
"Q. I am trying to get at practically how you work. Is the way you describe the way the purchases of leaf tobacco are made?
"A. Pretty much the same way.
"Q. Both in the southern and western field?
"A. I am not familiar with the system in all these sections.
"Q. But this committee gets together, determining its needs, having statistics from all over the country, and then it decides what it is going to pay on an average for each grade and then instructs its buyers to go in the field and get it; is that right?
"A. That is right, but they don't determine each price. I said about an average for each grade.
"Q. I know. You can not tell from that whether it is 6 or 7, but something in the neighborhood of 7 or 8 cents?

"A. Yes; we have to have some figure to go by.

"Q. You give them a margin on either side of the central figure?

"A. Yes, sir.

"Q. Has the American Tobacco Company a representative purchasing tobacco in substantially every tobacco market of the United States?

"A. In every market where they use that type.

"Q. Don't you use some of substantially every type grown in the United States?

"A. We use some, yes; but very little of some types."

Now, that is the control, and you can imagine, with a buyer in every tobacco market in the United States, representing a concern that uses up to 97 per cent of the entire product of certain kinds of tobacco, and with a limit of price fixed by a committee in that way—you can imagine what active, aggressive competition there is, and what an open market, when the farmers gather in the way depicted here so movingly yesterday, and how much scope and range there is for the creation of a price independently of this combination.

In a recent decision by the circuit court, four judges concurring, in the eighth circuit, in the case of the United States *v.* The Standard Oil Company—which has been docketed in this court, and which will come on for hearing, I hope, shortly—Judge Sanborn, writing the opinion, concurred in by all the judges, uses this language, which I cite because I think it is a very accurate statement of the law:

"The test of the legality of a contract or combination under this act is its direct and necessary effect upon competition in interstate or international commerce. If the necessary effect of a contract, combination, or conspiracy is to stifle, or directly and substantially restrict, free competition in commerce among the States or with foreign nations, it is a contract, combination, or conspiracy in restraint of that trade and it violates this law. The parties to it are presumed to intend the inevitable result of their acts, and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute."

But, the defendants say, that language was used by the court in considering the Northern Securities case, which was the case of a holding corporation; and they say we have here no such thing as a holding corporation.

Mr. Johnson undertook to define a holding corporation, and that is a help in meeting his arguments, because the definition of terms is always a prime essential to successful debate. He says (I took down his language as well as I could; he spoke somewhat rapidly):

"A holding company is not one which acquires shares of stock for the promotion of its trade, but one that acquires shares for something not involved in its actual business."

I do not care whether that is a holding company or not, and I do not think the discussion is apposite. It is not a question of whether this is a holding company. There is no statute against

holding companies. The question is whether by holding the stock of sixty-odd corporations under one common control there has been created a combination or a conspiracy in restraint of interstate trade and commerce which brings it within the prohibition and denunciation of the Sherman Act. All that was held in the Northern Securities case was that putting into the hands of a corporation created for that purpose of the control of the capital stock of competing railroads brought about a control of those two railroads which enabled the corporation holding that control to restrain the otherwise free and unfettered commerce between those roads. So here, the putting of the business of these respective corporations engaged in the manufacture and sale of different products of tobacco, into the hands of the American Tobacco Company, makes it a complete combination in restraint of trade, whether the American Tobacco Company itself manufactures, or itself does not manufacture. It makes no difference whatever that the American Tobacco Company began, itself, as a monopoly of one single product. It did begin as a monopoly of one single product. It makes no difference that its direct restriction of trade was confined to one single line. It was conceived in sin and born in iniquity. The whole purpose of its organizers in getting together was to stifle the active competition that existed at that time in the manufacture of cigarettes in the United States. It accomplished that purpose and then, expanding, reaching out, going into new fields, using other agencies, it created separate corporations; here one, there one, and there another. It conveyed certain lines of its business and property to them. Itself blazed out the way, perhaps, starting a little business, getting an opening. It hung its hat on the nail, and then sat down in the house, and by and by it called in some of its family and established them there. And so the monopoly grew, and so the combination expanded, and so the conspiracy was effected, and so by all these methods it brought about this great comprehensive control of all these lines of industry, which the record in this case demonstrates.

Mr. Justice Brewer. Mr. Attorney-General, may I ask you a question?

Mr. Wickersham. Certainly.

Mr. Justice Brewer. Suppose that instead of there being different corporations and different individuals interested, one man had the capital in his own right, and had bought up all these properties and was carrying on all these various businesses that are carried on by these people. Would the fact that he had such an enormous holding of his own, which put into his hands of course the power, if he saw fit to exercise it, to affect the commerce of the country, be sufficient to say that his holding and his carrying on that individual business was in restraint of trade and interstate commerce?

Mr. WICKERSHAM. It is almost impossible to answer your honor's question directly, because it assumes a result that you can hardly imagine accomplishing, except by means of contracts which in themselves might prove to be in restraint of trade. I am not willing to say. I will be frank to your honor, and state that I am not willing to say that an individual extending his business by ordinary, legitimate means, buying additional properties himself, and extending his trade, and coming by that method into the possession of a large amount of property, or, if you please, of the trade in one particular line, would be violating the antitrust law. I am not willing to say that.

Mr. Justice BREWER. You say you think he would be?

Mr. WICKERSHAM. I say, I am not willing to state that he would be violating the antitrust law. It is not necessary to go that far here, and it is not necessary to test the act by an extreme illustration like that, because so much would depend upon the method by which he reached the state of control and exclusion to which your honor refers. But of course there is a great difference between such a case and the case of these mergers of corporations, and these series of acquisitions of competing concerns, rolling up finally into this great aggregation that we have before us at the present time. And while I know that my friends would like to accept the test to be that which your honor suggests, just as they put their case on the proposition that if a man has the right to buy one piece of property and to take a restrictive covenant from the vendor, in order to protect him in the exercise of the ownership which he may have acquired, that they have an equal right to buy 10,000 such properties and take 50,000 such covenants; yet I say that it does not follow that because what may be done in one instance and be perfectly legitimate and not offend against the act, there would not come a time, as a time has come here, when the acts of the defendants would constitute them a combination with potentiality so great over the trade and commerce of the United States in a given line as to make them fall directly within the prohibition of the law.

Now, Congress undoubtedly did not mean to legislate against the natural legitimate growth of business of an individual. Congress did mean to legislate against the creation of those great aggregations of capital and industry which dominate the commerce of the country in certain lines, and which tend to destroy the initiative of the individual citizen and make him what this man in the letter that I read here to-day described himself as being—a slave in chains. That was the theory of Congress.

It may be that that was all wrong. It may be that the principle upon which the statute was founded was erroneous; but nevertheless Congress was undoubtedly, in passing that act, expressing the mature, deliberate judgment of the people of these United States, that it was

far more important to them that all combinations of the character that we have here should be destroyed, than that our great foreign trade and commerce should expand as it has done, and that we should be as rich a nation as we are. In other words, they said there was something better than the mere acquisition of great wealth; there was the independence of competition between individual men, each one free under the law to pursue his own livelihood unfettered and unrestrained; and that that bred up a better nation of men than the mere serfs of a great industrial organization.

Mr. Justice DAY. Let me ask you a question in a little different form from that of Mr. Justice Brewer. Suppose that there are five States in the Union having each a tract of anthracite coal, and that a man not in the business, but who had a large capital, went in with the deliberate and evident purpose of acquiring the control in those five States of those bodies of coal which had been theretofore in independent hands, for the purpose of shipping it throughout the Union. Would that be a form of monopoly in coal?

Mr. WICKERSHAM. It would, very much so. I think a different element also would enter into that example, because I think there we have a commodity which is an absolute necessity to life, and I have always thought that such a commodity was charged with a public use, just as much, if not far more, than what is called public utility companies. I should not hesitate to say that there the public interest was so great that a different principle was in effect.

Mr. Justice WHITE. Let me ask you a question. I want to understand your argument. You have repeatedly said in your argument that it is not the acquisition of the property to which you address yourself—that that is not objectionable.

Mr. WICKERSHAM. Not the direct acquisition of property.

Mr. Justice WHITE. Not the direct acquisition of property. Then you eliminate the acquisition of the property by acquiring stock in the property so as to get control of it?

Mr. WICKERSHAM. No, sir; I do not. I think——

Mr. Justice WHITE. Then what do you mean by the words "not the acquisition of the property?"

Mr. WICKERSHAM. By the words "acquisition of property" I mean the direct ownership of property. I mean what your honor pointed out in the commodities-clause case. I mean the acquisition of property, as there it was the property to be transported, and not property in which there was a stock interest.

Mr. Justice WHITE. I simply want to get the distinction in my mind. I am not indicating in the slightest degree any impression. I want to get it in my mind. You say that you do not raise any objection to the acquisition of property?

Mr. WICKERSHAM. As such.

*

Mr. Justice WHITE. As such? I do not know exactly what "as such" means. You do not object to the acquisition of property. What, then, is the criterion here, if the acquisition of property is not objectionable, which you submit for the purpose of testing the validity of the law?

Mr. WICKERSHAM. It is the control of commerce; because a man might buy all the factories in the United States——

Mr. Justice WHITE. You admit that they can buy them, but you say that they can not use them, because in using them there is a restraint of commerce.

Mr. WICKERSHAM. It would be stifling interstate commerce.

Mr. Justice WHITE. Then you certainly do not admit the right to acquire property, if a man can buy a house and not live in it. You say that he has a right to buy the house, but can not live in it.

Mr. WICKERSHAM. Perhaps I had better make myself a little more clear. We live under a dual sovereignty. What would amount to ownership of property depends on the laws of the State where the property is situated. A man may buy it and sell it, but when he buys property which is the instrument of interstate commerce, or when he buys property which is a part of the business of interstate commerce, he buys subject to the regulation of interstate commerce by the Federal Government, does he not?

Mr. Justice WHITE. Yes.

Mr. WICKERSHAM. I have a right to buy a house.

Mr. Justice WHITE. Say, a grocery business.

Mr. WICKERSHAM. Well, a wholesale grocery business. But, if there are two competing wholesale grocery concerns, and they are engaged in interstate commerce, and are competing with each other, under this law, I may not buy the two businesses and terminate the competition which existed between them in interstate commerce.[a]

Mr. Justice WHITE. Then you attack the right to buy them. You say, as to the two wholesale groceries, both having a stock of goods, that he may buy; but if he does, he can not sell the goods. Therefore he can not buy.

Mr. WICKERSHAM. If your honor had applied that same ruling in the Knight case, we would have had a different decision.

Mr. Justice WHITE. I am not talking about that.

Mr. WICKERSHAM. Is there not a distinction there? I am not making a fanciful distinction. I am making the distinction that this court has established.

Mr. Justice WHITE. I am trying to get your distinction.

Mr. WICKERSHAM. I am standing on the distinction drawn by this court in the Knight case. You held there that it was perfectly

[a] This proposition is stated too broadly. It is accurate if the facts of the given case show that the transaction is *intended* to restrain commerce, or that such would be its *necessary* effect.

competent; that the United States could not object to the purchase by the American Sugar Refining Company of the four refineries which gave it 32 per cent more of the manufacture and control of sugar in the United States than the 65 per cent it already owned, because it was merely acquiring the property in the State of Pennsylvania, and it did not appear that it had any effect upon the commerce in sugar.

I accept that, as I must, loyally, it being your decision, and I say therefore you have held that the mere acquisition of property alone does not violate the Sherman Act; but I say that we show here what was not shown in that case, that the purpose of this acquisition is to restrain trade, and that these properties are used in and constitute a part of the current commerce between the States.

Mr. Justice WHITE. As I understand your statement, then, you have said that there is a right to acquire, and that it is the use that you challenge. Your qualification now is, as I understand it, that the purpose for which he acquires it becomes the determining factor, if, as you say, these acquisitions and these things were done for a particular purpose. Is that the point?

Mr. WICKERSHAM. That is it.

Mr. Justice WHITE. I simply wanted to understand it.

Mr. WICKERSHAM. That is it. In the Northern Securities case the court did not challenge the right of the Northern Securities Company of New Jersey to acquire shares in the Northern Pacific and Great Northern railroads. You did not interfere with the title. You said that as they were using them as a means of controlling interstate commerce, you would enjoin the use, although you did not challenge the title. It seems to me that that is the proposition that this court has declared in these decisions. Therefore, I say I do not, of course, challenge the basis of the line of decisions of this court.

Mr. Justice HOLMES. Prayer 6, contained in your original petition, reads: "That the holding of stock by one of the defendant corporations in another under the circumstances shown be declared illegal and that each of them be enjoined from continuing to hold or own such shares in another and from exercising any right in connection therewith." So that I should think your bill, taking it from your brief, went rather further than you state it.

Mr. WICKERSHAM. Of course when a bill is drawn the general scope of relief is as the pleader may at the time think it should be, and he usually frames it so as to invoke any relief that might possibly be granted. The decree which your honors will find at page 330 of the first volume of the record, finds that these defendants are combinations, and that the American Tobacco Company has acquired certain stock; and it enjoins what? It enjoins the American Tobacco

Company from perfecting this combination and from accomplishing this monopoly by causing the transfer from these companies, which it has acquired, from the company whose stock it has acquired, to itself for the purpose of cementing its control of these subjects of interstate commerce.

Mr. Justice DAY. I want to call your attention for a moment to the second section of the act. What do you say as to the contention that was put forward here yesterday as to "every person who shall monopolize or attempt to monopolize," etc.—that such monopolizing or attempt must be by means illegal in themselves? That argument was pressed with a good deal of force yesterday. I would like to hear you at the proper time in the course of your discussion on that question.

Mr. WICKERSHAM. Of course the original idea of monopoly was the old royal grant of exclusive right of sale, and it implied the acquisition by the highest means known to the law, namely, by the grace and power of the sovereign, of the right to exclude all others from the field embraced within the grant. Certainly there was no idea of an unlawful method of reaching this control there. That was monopoly in its original intendment; and a subject could have no stronger title, or no more legitimate means than the grant from his sovereign. Of course, as your honors pointed out in two or three of the decisions in this court, and particularly as his honor Mr. Justice McKenna has pointed out in the Cotton Oil case, the modern idea of monopoly is that it is the suppression of competition by the unification of cost and management. I think that is probably as good a definition as has been formulated by anybody—the suppression of competition by the unification of cost and management. That puts the combination which has suppressed competition and unified the management and got into a position where it has power to exclude others, in the position of being a monopoly. It answers, also, I think, Mr. Justice Day, your question. Somewhere along the line, to reach that point, it is almost inevitable that a contract or combination in restraint of trade should have been made; but I think the second section was passed in its present language for the very purpose of eliminating the necessity of inquiring into the origin, because you will observe that the prohibition there is against any person who shall monopolize or attempt to monopolize. It does not matter how he reaches that state, if the law finds him monopolizing or attempting to monopolize the trade or commerce between the States or with foreign countries, then it finds him contrary to the statute, does it not? You can hardly imagine his getting there without having done some act which is condemned by the first section; yet he may; and, as I understand it, it is not necessary to inquire how he got there if you find him there. It is like finding

a thief in your house. You do not stop to examine as to whether he came through the scuttle, or came in through the front window, or through an open door. If he is there, purloining your valuables, you put the hand of the law upon him.

Judge Noyes in his opinion gave a definition of "monopoly" which, I think, is a very good one. I do not think it has been much improved on. He has availed himself of the suggestion of Mr. Justice McKenna, made in his opinion to which I referred. Here is what Judge Noyes said:

"The authorities warrant the statement that a monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition."

He cites authorities on that point.

You remember, in the case of the Shawnee Compress Company (209 U. S., 423–434), Mr. Justic McKenna in delivering the opinion of the court said there that it was not a case simply of the lease of one compress; it was not a case of challenging the right to make the lease, or the right of the compress company to make the lease; but he said, "It presents acts in aid of a scheme of monopoly," and therefore the State of Oklahoma had the right to strike it down without regard to the fifth amendment.

Now, just briefly a word about these foreign contracts. It is in evidence that the American Tobacco Company went to England and bought a factory, and was going into the business to compete there with the English company. It is also in evidence that it was the intention of the Imperial Company to come here and establish a factory. Under those circumstances, these great lords of industry met in the city of London and there, like the triumvirs of old, they parceled out the world among themselves. Like ancient Gaul they divided it into three equal parts, and each one of them——

Mr. HORNBLOWER. Probably you are not familiar with the evidence in the court below, and I desire to challenge your statement that there is any evidence in the record that the Imperial Company intended to start manufactories in this country.

Mr. WICKERSHAM. I read it in the record this morning. I can not turn to it immediately, because I neglected to make a note of it; but I accept the challenge, and I will furnish the court with the citation if it is desired. There is a reference to it in the record, which I read this very morning in running over it, and I meant to put it down, but did not.[a] I say they got together in the city of London to divide the business of the world. They did three things by their agreements, which

[a] The reference is to Vol. II of Record, pp. 210–11, 241–2, 245–6.

are in evidence. In the first place, the American Tobacco Company agreed that it would retire from Great Britain. In the next place, the English Company agreed that it would retire from the United States, except for the purchase of its leaf tobacco; and in the third place, they created a third corporation, two-thirds of the stock of which was owned by the American Company and one-third by the Imperial Company, and to that corporation they conveyed all their export business, which was the right to do business between the United States and all foreign countries except the Regie countries, and between Great Britain and all foreign countries but the Regie countries; and they buttressed that transfer with covenants, with protective covenants. They took covenants from each of the individuals, each of the directors of these companies.

They entered into covenants, each one that it would carry out the terms of the agreement, and that each one would not directly or indirectly go into business in the territory of the other; and from that time on all competition in the United States in the purchase of leaf tobacco which goes to any other country in the world but Great Britain has been practically in the hands of the American Tobacco Company, which purchases for the British-American Tobacco Company, two-thirds of whose stock it owns; and the Imperial Company, in which a certain amount of stock—not a large amount—is still owned by the American Tobacco Company, and on whose board the American Tobacco Company has three representatives, buys here its supply of leaf and raw tobacco.

I say that those contracts, in so far as they called for any action within the jurisdiction of the United States of America, and in so far as this record shows there has been any action within the United States of America, are absolutely void and in the teeth of the Sherman Act, and that they went to the city of London and executed them there for the purpose of avoiding the Sherman Act, and that they have not succeeded in doing it in so far as it affects any portion of the trade and business under the jurisdiction of the United States of America; and that the decree of the court below should have dealt with that subject and should have enjoined the carrying out of the acts of the defendants pursuant to that contract.

My friend, Mr. Hornblower, has referred to the decision in the Banana case (*American Banana Co.* v. *United Fruit Co.*, 213 U. S., 347) to sustain his contention that these defendants escaped the jurisdiction of the United States when they went to London. The Banana case was a suit for damages under section 7 of the act by a plaintiff claiming to have been injured by acts done by the defendant contrary to the provisions of the Sherman Act, and was predicated entirely upon acts performed in a foreign country; and this court held that it had no jurisdiction to entertain such a claim; but

the case at bar is entirely within the principle of Waters-Pierce Oil Company *v.* Texas (212 U. S.), where it was held that although an agreement to violate the antitrust law of a State be made outside of that State, if the parties thereto or their agents execute it, or attempt so to do, within the State, they are under the jurisdiction of the State, and their conviction for such contracts is not without due process of law.

I do not know that I have anything to say about the United Cigar Stores Company, except this: Of course, of and by itself, the United Cigar Stores Company would be wholly outside of the scope of this bill or of the act of Congress, but as a tentacle of this main combination, growing in importance as is shown by this record, reaching out and attempting to monopolize the retail trade and commerce in the commodities dealt in by this combination, it has an importance which is wholly apart from its single, detached existence; and the naïveté of the suggestion that any concern, the large majority of whose stock is owned by the main corporation, the American Tobacco Company, with its necessary interest to advance the sale of its products, is being so administered as to advance the sale of the products of its competitors, is a strain upon the credulity which one would hardly imagine being indulged in.

It seems to me that if there ever was a case presenting in the most subtle, in the most extensive and in its most dangerous form, restraint of interstate trade and commerce; if there can be an industrial monopoly within the purview of the Sherman Act, the facts in this record present such a case. It may be that there is no such thing as a monopoly, but the framers of the Sherman Act took great pains not to plant their prohibition upon the assumption that there was, and your honors under your own decisions do not have to find the existence of a monopoly in order to affirm this decree. All you have to find is certain defendants monopolizing or attempting to monopolize the trade and commerce of the United States in a particular commodity between the States and with foreign nations; or to find that they have been making, and are before the bar of the court engaged in a combination, of whatever kind, which either restrains and controls the trade and commerce of the nation, or which puts them in a position where nothing but their own moderation stands between them and the complete domination and control of that trade and commerce. That is the evil, whether it be a fancied evil or a real evil, which the people of these United States had in mind when their Representatives in Congress assembled enacted the Sherman law; and it was to meet just this condition of things, wisely or unwisely, but certainly within the constitutional power of Congress, that this simple, comprehensive, far-reaching, and important statute was passed.

I thank the court.

If your honors please, may I have permission to file a memorandum with the court within four or five days?

The CHIEF JUSTICE. Yes.

Mr. NICOLL. Will your honor extend to us the same privilege?

The CHIEF JUSTICE. Yes.

Mr. HORNBLOWER. That applies to our counsel, also, I suppose?

The CHIEF JUSTICE. Yes.

In addition to the foregoing oral argument, which is printed for the use of the court, a word or two may be added upon certain points made by the defendants in their arguments.

In answer to the contention put forward by the defendants that it is only executory contracts, etc., which have been declared unlawful under the Sherman law, it may be said that the tobacco combination is always executory. It is in active state to-day of attempting to monopolize a large part of the trade and commerce among the States and with foreign nations in the products of tobacco; it is to-day existing just as the Northern Securities Company was existing when the petition of the Government was filed against it as a combination in restraint of trade. Its *title* to the various properties which it has purchased or otherwise acquired under state laws is not assailed; the *validity* of its incorporation or of the mergers, or of the *consolidations* made between different companies is not questioned. *What is attacked* is the restraint put upon interstate and international commerce by its activities as a combination, and in its attempted monopolization of interstate and international trade. The course of interstate commerce is vexed by this monopoly and, therefore, within the decisions of this court, it was proper that the process of injunction should remove such obstruction. This also answers the argument that an owner or corporation *actually engaged in interstate commerce can not be excluded from such commerce under the Sherman Act without depriving him or it of property in violation of the fifth amendment.* It is true that the right to engage in interstate commerce is not conferred by the Constitution but antedates it; but it is also true that by the Constitution the power to regulate such commerce was vested in Congress, and that the enjoyment of the right to engage therein is subject to such regulations as Congress may choose to impose.

In *Hale* v. *Henkel* (201 U. S., 43) Mr. Justice Brown, in delivering the opinion of the court, said:

"It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the

legislature of that State, but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress."

It is also held by this court that the very conferring of the power to regulate commerce was in effect the declaration of a rule that no State or individual should interfere with the free flow of commerce among the States, but that the power of Congress over that subject was exclusive of all others. Congress, therefore, having this power, has seen fit to declare the conditions under which interstate commerce may be carried on, and in effect, that no one shall carry on such commerce except in conformity with the rules which it has prescribed. Defendant's property is not invaded when a court of equity finding that it has violated a congressional rule enjoins it from the further participation in interstate commerce until it shall bring itself into harmony with the law.

Moreover, a corporation created by the laws of a State has no power to exist outside of that State except as permitted by the comity of the other States into which it may enter, and is wholly subject to such rules and regulations as such States may respectively impose; and it can have no right to enter upon interstate commerce, the regulation of which is confined exclusively to Congress, unless Congress shall permit it; and then not otherwise than upon the terms prescribed by Congress. *The case of Monongahela Navigation Company* v. *United States* (148 U. S., 312), cited by the defendants did not decide that corporations stood on the same basis with individuals or had any rights in interstate commerce, except subject to such rules and regulations as Congress might see fit to prescribe. It appeared there that the Navigation Company organized under the laws of the State of Pennsylvania in conformity with those laws, and pursuant to the express authority of an act of Congress, had erected a dam in a navigable stream for the purpose of assisting in the development of that stream, and that it had the right under the state and national law to collect tolls for the use of its locks and dam. It was held that these rights or franchises constituted property which could not be taken by Congress in the exercise of its discretion to improve the navigability of the stream except upon making compensation to the defendant company for the value thereof.

It is true that up to the present time as stated in *L. & N. R. R. Co. v. Kentucky* (161 U. S., 677, 702):

"In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbids interference therewith; while to the States remains the power to create and to regulate the instrument of such commerce so far as necessary to the conservation of the public interests."

But this is merely because Congress has so chosen, and its power to take from the States the creation or regulation of the instruments of such commerce can not well be doubted.

In the *Lottery case* the right to prohibit the carriage of articles from State to State when, in the opinion of Congress, such carriage was injurious to the public health or morals, was affirmed, and it was declared to be no part of anyone's liberty as recognized by the supreme law of the land that he shall be allowed to introduce into commerce in the States an element that will be confessedly injurious to the public morals (188 U. S., 357). "We should hesitate long," said Mr. Justice Harlan, in delivering the opinion in that case—

"before adjudging that an evil of such appalling character, carried on through interstate commerce, can not be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce."

And he cited what was said by the court *in re Rahrer*, 140 U. S., 545–562:

"The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge."

He further pointed out other instances in which the regulation of commerce had sometimes properly assumed the form of prohibition; such as the case of transportation of diseased cattle from one State to another, and then referred to the Sherman Act where, in order to regulate commerce among the States, the legislation took the form of prohibition, Congress declaring certain contracts to be illegal.

"That act," he says, "in effect prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of Congress to regulate interstate commerce."

So in the *Commodities Clause case* (213 U. S., 366), a congressional prohibition of carriers from transporting commodities which they own at the time of transportation was sustained. Defendants' counsel argue that a special reason existed for prohibiting that particular class of property owners from carrying goods in interstate commerce. But an equally potent reason exists in the present case, where the prohibition is enacted for the purpose of protecting the great and fundamental principle of freedom of interstate and for-

eign commerce. Congress has in effect empowered the courts to exclude those from the privilege of engaging in it who violate the rules prescribed for its exercise. The defendants by the decree of the circuit court were enjoined from engaging in interstate commerce because they have been adjudged guilty of a deliberate violation of the rules prescribed by Congress for the guidance of parties engaged in interstate commerce, and in order to preserve it from restraint, control, and monopolization. If defendants are aggrieved by this prohibition, they have only to conform with the provisions of the decree by "the restoration of reasonably competitive conditions," and then they may apply to the court for a modification, suspension, or dissolution of the injunction granted against them (Record, Vol. I, p. 332).

The fact is that the decree of the Circuit Court did not go far enough. The individual defendants who are shown to dominate and control the activities of this great combination should have been comprehended in the decree and enjoined from continuing or carrying into effect the combination adjudged to be illegal, and from entering into or performing any like combination, the effect of which is or will be to restrain tobacco or its products among the States, or in the Territories or among foreign nations, or to prolong the unlawful monopoly of such commerce obtained and possessed by the defendants; and the British-American and the Imperial Companies should respectively have been enjoined from carrying on business within the jurisdiction of the United States in violation of its laws.

The nature and effect of the contracts between the American and Imperial Tobacco Companies, Government's Exhibits 1 to 4, inclusive (Rec., Vol I, pp. 111–138), are set forth in the Government's brief, pages 116, 117, and pages 166–168.

They fall precisely within that class of agreements which in the case of *Brooklyn Distilling Company* v. *Standard Distilling Company* (120 N. Y. A. D., 237), referred to in the brief of the Imperial Tobacco Company at page 30, are described as the class of agreements to prohibit which the New York antimonopoly statute was enacted, namely, agreements by the controllers of property entering into combinations to regulate production and maintain prices for their mutual benefit, according to their respective interests. The proposition that certain minor contracts in partial restraint of trade, made incidentally to and for the purpose of effectuating other legal contracts, are not unlawful, either at common law or under the Sherman Act, is not disputed, but the proposition that this modern, industrial triumvirate can parcel out the business of the world into three parts and escape the jurisdiction of the United States because they make their agreements in Great Britain, while novel and audacious, derives no encouragement from either the Sherman Act or

from any decisions of this court construing that act. The theory that no decree can be made in this suit against the Imperial Tobacco Company, because it would thereby be robbed of the fruits of the agreement which it has entered into, and that unless it could be put back in possession of the consideration which it paid for the purchase of Ogden's Limited, on the faith of the covenants of the American company, the Government must allow it to continue to violate its laws, has the merit of the same audacity which characterizes its other contentions.

But this proceeding is not an action by one of the parties to the contract for a rescission, to which the theory of doing equity before equity can be granted to it applies. Here the Government of the United States, finding an alien corporation engaged in combination with its own citizens and with corporations created by States of the Union, in violation of federal law, asks the federal court to enjoin it from abusing the right of conducting commerce in and with the United States and to restrain it from using such avenues of commerce, so long as it does so for the purpose of effectuating an illegal combination.

Finally, with respect to the operation of the contracts, while it is true that three possible evils aimed at by the Sherman Anti-Trust Act are (1) raising the price of a commodity to consumers, (2) the lowering of prices of raw material to producers, (3) the crushing out of competitors—these are only incidents to the main evil at which the act is directed, which is interference with the free and unfettered course of interstate and foreign commerce.

Finding that the defendants are carrying out a scheme entered into in direct violation of a United States statute, it is submitted that the court will not be astute to weigh and measure the precise amount of damage done or of interference with the free flow of commerce thus far accomplished, but will consider the powers placed in the hands of the conspirators by their unlawful combination, and finding them engaged within our borders in carrying out this unlawful scheme, will interpose the power of the United States to prevent the further accomplishment of their unlawful design.

GEORGE W. WICKERSHAM,
Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES OF AMERICA, appellant,
v.
THE AMERICAN TOBACCO COMPANY AND others. } No. 118.

THE AMERICAN TOBACCO COMPANY AND others, appellants,
v.
THE UNITED STATES OF AMERICA. } No. 119.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

I.

Outline of the Case.

This is a proceeding against The American Tobacco Company, its officers, directors, and affiliated corporations, seeking "to prevent and restrain"

monopolies and restraints of commerce in tobacco and related commodities in violation of the Sherman Act (26 Stat., 209) and certain provisions of the Wilson Tariff Act (28 Stat., 570). The statutes are Appendixes "A" and "B."

The original petition was filed July 10, 1907, in the United States Circuit Court at New York; the answers in October, following. An Examiner was appointed; voluminous proofs were taken; the Attorney-General certified that the case was important; it was argued in May, 1908, before four circuit judges; and November 7, following, opinions were filed, three judges concurring, one dissenting. The final decree (December 15) enjoined certain corporate defendants and dismissed the petition as to the others. Cross-appeals were taken, errors assigned, the record filed here (Dec. 23, 1908); and on the Government's motion the cause was advanced.

A general outline (details appear later) of the salient facts and issues follows—

Defendants are The American Tobacco Company, its officers, directors, and sixty-odd affiliated corporations, organized in different States (generally New Jersey), except the British-American Company and Imperial Company, which are English; and they are engaged in the manufacture of and interstate and foreign commerce in leaf tobacco, its products, and related articles. Their business extends to all parts of the United States and throughout a large part of the world.

The American Tobacco Company, through stock ownership, controls all corporate defendants except the Imperial Company—English Combination (Gov. Ex. 87, R. V), and in this it is a large stockholder and selects three directors. Since 1902 commerce in tobacco throughout the world has been apportioned by written agreement between the two, executed in England; and under the express terms of this arrangement the British-American Company was organized to carry on the business beyond the United States and England theretofore conducted by the contracting parties in competition.

Leaf tobacco grows in twenty-five States, is of radically different types, with many grades; and is principally used for cigars, cigarettes, snuff, chewing and smoking tobacco, each of which, speaking broadly, belongs to a separate department of trade. The average annual domestic production for ten years has been around 800,000,000 pounds, with downward tendency; the demand has steadily increased. The cigar type (180,000,000 annually) grows in the Northern States; the greater portion of the others in Kentucky, Virginia, and North Carolina.

Prior to 1890, in different States and abroad, many independent concerns manufactured and traded in tobacco and related articles—the result of growth and development along ordinary lines. Each was mainly devoted to cigars, cigarettes, snuff, chewing, or smoking tobacco, but frequently more than one of these was produced. Some were financially strong, with large output, but no one controlled a very great

share of the whole, and there was active, unrestricted competition among them as buyers and vendors. Leaf was purchased in the States where it grew, transported to the factories and converted into articles for consumption; and in the usual way through drummers, agents, representatives, and dealers these were sold and distributed throughout the United States and abroad. Like conditions prevailed with respect to licorice, tin-foil, containers, boxes, and other related articles.

Some thirty years ago manufacturers began to pack tobacco products in small parcels, marked with distinctive names or *brands*, to be retailed at five cents or some multiple, and by advertisement and otherwise sought to popularize these. As a result, the business became a "matter of brands" and the leading ones highly important, indispensable, indeed, to jobbers and retailers. The success of a brand depends primarily on a secret formula and advertisement; it may be acquired from the originator and manufactured by others without loss of public favor.

Prior to 1890 five concerns, with plants in North Carolina, Virginia, and New York, purchased the necessary leaf (less than 15,000,000 pounds annually) and manufactured, sold, and distributed here and abroad in the usual ways 5,000,000 pounds of smoking tobacco annually (less than 8 per cent of the whole) and 97 per cent of all cigarettes (all the popular brands). They had large interstate and foreign trade and were sharp competitors as buyers and

sellers. Under leadership of defendant James B. Duke the owners of these determined to combine. Accordingly, in January, 1890, they organized the original American Tobacco Company of New Jersey, with broad powers and $25,000,000 capital (increased in 1891 to $35,000,000; in 1899 to $70,000,000), which thereupon took over the business, assets, etc., of all (but without covenants against future competition), issuing therefor its entire share capital in agreed proportions; and their managers or owners became its officers and directors. The competition theretofore existing was at once destroyed and a monopoly of the cigarette trade established.

The new company was immediately successful; the parties interested determined to extend its operations; and with enlarging purpose to restrain trade and acquire monopolies they actively entered upon the plan (since pursued) of acquiring plants, assets, etc., of other manufacturers and dealers in tobacco (including all varieties), giving therefor cash or stock and taking from the owners, stockholders, and managers contracts obligating them not to compete. In pursuance of this purpose they constantly practiced unfair trade methods and exercised duress. Acquired plants were generally closed; the brands were sometimes utilized, more often allowed to die; and the interests formerly competing acted in harmony.

Seeking an ever-increasing proportion of the trade, The American Tobacco Company came into fierce conflict with other manufacturers and vendors—especially

those of plug; and between 1892 and 1898 the "plug war" was waged, during which very large sales were made by it below cost and at tremendous loss. The competition was especially sharp between The American Tobacco Company; P. Lorillard Company, of Jersey City; the P. J. Sorg Company, of Ohio; John Finzer & Brother, of Louisville; Daniel Scotten & Company, of Michigan; J. Wright Company and P. H. Mayo & Brother, of Richmond, and the Brown and Drummond Tobacco companies, of St. Louis all old, strong, well established. To destroy this the parties by agreement (1898) caused the organization in New Jersey of Continental Tobacco Company with broad powers and $75,000,000 capital (increased April, 1899, to $100,000,000). By issuing stock this company at once acquired control of P. Lorillard Company, since continued as a separate organization; received conveyances of plants, assets, etc., of others; and took from the vendors and principal shareholders agreements not to engage in the tobacco business. The American Tobacco Company transferred the assets, brands, good will, etc., appertaining to its plug business in exchange for $30,274,200 stock, $300,000 cash, and the losses sustained in that department during 1898—$840,035, and James B. Duke, its president, became president of the new company.

Paying therefor in cash or stock the Continental Company rapidly obtained control of the remaining important plug competitors (requiring of vendors agreements not to engage in the business), and in a

short time completely dominated the trade and so continued until the merger of 1904, hereafter described.

About 1898 the Continental and American companies actively entered upon the policy (since pursued) of securing control of competitors by acquiring the majority shares of going companies or by causing subsidiary corporations to be organized (usually in New Jersey), which, by prior agreement, immediately took over competing businesses of others. In these ways scores of competitors were acquired. The relationship was sometimes known, but often denied. Secret ownership and operation were not abandoned until exposed (1907) in connection with this proceeding.

Prior to 1900 the Continental and American tobacco companies were manufacturing, selling, and distributing snuff; their joint output in 1899 was 5,000,000 pounds. Between them and the Atlantic Snuff Company (annual output 5,000,000 pounds), itself incorporated to unify competitors, and other large producers, there was sharp competition. Early in 1900, by preliminary agreement, the American Snuff Company was organized in New Jersey with $25,000,000 capital, and immediately took over the snuff business of the several concerns, with covenants against future competition, issuing in payment stipulated amounts of stock. This company then began to acquire the business or stock control of others, for its stock or cash, and has continued that policy. In 1907 its output was 22,067,234 pounds—96 per cent

of the total for the United States. No relatively important independent domestic manufacturer of snuff remains. The American Tobacco Company and affiliated corporations own 40 per cent of the snuff company's stock; for many years have controlled stockholders' meetings and dominated its affairs; and complete unity of action prevails.

In the spring of 1901, the United Cigar Stores Company was incorporated in New Jersey, with $2,500 paid up capital, by parties not connected with the "Trust," to sell and distribute tobacco products at retail (R. III, 100). In November following, The American Tobacco Company acquired control, and has since financed and supported it—supplying enormous sums; but for a long time the relationship was secreted and denied. The share capital now outstanding is $1,650,000—bonds $2,850,000; three-fourths of the former and all of the latter are held by The American Tobacco Company. The United Company conducts retail stores in large cities and receives special inside prices and active aid from other defendants. The consequent growth has been phenomenal; sales at retail in 1907 amounted to $16,000,000 (R. III, 109). Through this company defendants are seeking dominion in retailing tobacco products, an avenue absolutely necessary to effective competition. It is engaged in interstate commerce; has bought out dealers, taking agreements not to engage in retailing tobacco, forced out others, etc., and through its connection is now too powerful for any ordinary competitor to withstand.

Licorice paste, essential in the manufacture of tobacco, is made from an oriental root. Prior to 1902, many imported the root, produced, sold, and distributed the paste—all in competition. The Continental Tobacco Company, seeking this business, caused the organization of its subsidiary, MacAndrews & Forbes Company, with capital of $7,000,000. The latter, by a series of purchases and combinations, in 1902 became dominant in the trade. Its only important competitors were J. S. Young Company, of Baltimore, and J. D. Lewis, of Providence, and in 1903 they all agreed not to compete. Secretly the Young Company through ownership of stock came under control of MacAndrews & Forbes, but was advertised and held out as independent. In 1906 the corporations were indicted for violating the Sherman Act and afterwards convicted. MacAndrews & Forbes, after the indictment, acquired all shares of the Young Company, took a conveyance of the business, plant, etc., and now has a monopoly and is without a formidable rival. The business of Lewis is small and dependent on the combination for raw material. In 1907 the domestic output of licorice paste was 40,000,000 pounds, of which MacAndrews & Forbes Company manufactured, sold, and distributed 95 per cent. It has agreements to supply at remunerative prices all defendants, and they use most of the world's output.

Prior to 1901 the American and Continental companies manufactured and sold cigars, stogies, and cheroots; Powell, Smith & Company, of New York,

were competitors. These determined to combine through a corporation and use it to dominate the trade. Accordingly, in January, 1901, they organized the American Cigar Company (of New Jersey) with capital of $10,000,000 (afterwards $20,000,000), of which the American and Continental companies each took 46½ per cent and Powell, Smith & Company 7 per cent. (The American Company now holds $16,000,000 stock and $10,000,000 notes), and all conveyed their cigar, etc., business, with agreements not to compete. The new company, following the usual methods, acquired control of concerns in the United States, Cuba, and Porto Rico, taking from owners and directors covenants against competition. In Cuba and Porto Rico, through the Havana Tobacco Company and the Porto Rican-American Company, the Cigar Company occupies a dominant place. In 1907 its domestic output (subsidiaries included) of cigars, etc., was 1,039,822,996—14 per cent of the total. It has many important subsidiary companies, including dealers.

Tinfoil, chiefly used for packing tobacco products, was formerly produced by many independent manufacturers. The American and Continental companies and subsidiaries became the chief users of it (requiring some two-thirds of total output) and desired to control the trade. In 1899, through agreement with John Conley & Son, large producers, the Conley Foil Company was formed and took over the partnership's business. The American Company secured a majority of the stock; and the new corporation has since

acquired one or more competitors and greatly extended its operations. It now furnishes foil to the allies under profitable contracts, and produces 75 per cent of the 22,000,000 pounds annually manufactured in the United States. Only one substantial competitor maintains a precarious existence.

The defendants are engaged through divers companies in the manufacture of and commerce in sundry articles more or less connected with the tobacco business, such as containers, boxes, machinery, extracts, germicides, pipes; and also in jobbing, retailing, planting, etc.

In June, 1901, certain officers and directors of the American and Continental companies, in order to supply additional funds and to secure dominion over both, organized the Consolidated Tobacco Company, a holding corporation, with $30,000,000 capital (afterwards $40,000,000), a slight majority of which was always held by six individuals—James B. Duke and others. By issuing bonds and manipulating securities this holding company at once obtained controlling shares of the two old companies and held them until the merger of 1904. All had the same president and operated with a common purpose.

In 1903, by preliminary agreement, the American Stogie Company was incorporated to combine the stogie business of competing concerns, and to that end has been manipulated in the usual ways. Of its $11,976,000 stock the American Cigar Company holds $7,307,200.

Purchasing supplies for the allied companies (except leaf tobacco) became so important that defendants in 1903 caused the organization of the Amsterdam Supply Company. Its stock was divided amongst them and they in turn agreed to buy through it. Its annual purchases amount to more than $25,000,000, and possible competition between its stockholders is prevented.

For many years, strong independent competing concerns in Great Britain bought large quantities of American leaf tobacco, converted it into finished products, and sold and distributed them throughout the world, including the United States. The American Tobacco Company had long done business in England, and in 1901 undertook vigorous measures to increase it. The strong British companies, becoming alarmed, in December, 1901, organized the Imperial Tobacco Company with capital of 15,000,000 pounds sterling (afterwards 18,000,000), which immediately took them over, and there followed a fierce commercial conflict throughout the world between it and the American combination.

In September, 1902, the Imperial and the American companies entered into contracts (executed in England) stipulating that the former should limit its business to the United Kingdom, except purchasing leaf in the United States (it buys 54,000,000 pounds annually); that the American companies should limit their business to the United States, its dependencies and Cuba; and that the British-Amer-

ican Tobacco Company, with capital of 6,000,000 pounds sterling divided between them, should be organized, take over the export business of both, and operate in other countries, etc. This arrangement was immediately put into effect and has been strictly observed; the interests of the Imperial and American companies were thus combined and motive for competition destroyed.

After the Northern Securities case it appeared expedient to change the relations of the Consolidated, American, and Continental tobacco companies; and, proceeding under a New Jersey statute, in 1904, the three were merged under the name of The American Tobacco Company, which has since carried on the business of all and has acquired control of competitors and extended its operations along the general lines above described.

The numerous controlled companies regularly report to the central office of The American Tobacco Company and all are operated in harmony.

The necessary leaf for defendants is purchased under a common oversight by agents in all important districts, directly from the grower or at central markets, then shipped to warehouses and factories as a part of commerce. Their purchases of domestic leaf in 1905 (since increased), including 50,000,000 by the Imperial Company, amounted to 468,000,000 pounds—about 20 per cent of the cigar type and more than two-thirds of all others—of some more than 80 per cent.

Defendants have acquired most of the leading brands of manufactured tobacco and are in position to control the avenues of distribution. Their products are advertised and sold through an army of representatives operating throughout the United States, whose detailed reports keep the central office advised of conditions in every locality. Immense sums are spent in advertising and distributing free goods—$10,000,000 by The American Tobacco Company alone in 1906. Through covenants many owners and managers of successful concerns have been retired from the trade and possible competition from them destroyed.

The combined assets of the allies exceed $400,000,000.

Their domestic output of manufactured tobacco in 1907, with percentages of totals, follow. [For output for each year since 1890, see Appendixes "F" to "M" hereto.]

	Defendants' output.	*Per cent.*	*Total United States.*
Cigarettes (for domestic sale)...(No.)	3,925,506,700	73.9	5,309,158,177
Cigarettes (a) (for export).....(No.)	1,805,117,150	(100?)	
Smoking.....(Lbs.)	127,638,531	71.2	179,172,512
Plug & Twist.....(Lbs.)	137,207,883	79.7	172,002,513
Fine Cut.....(Lbs.)	10,115,315	81.1	12,457,917
Little Cigars.....(No.)	954,001,460	89.2	1,069,215,111
Snuff.....(Lbs.)	22,067,234	96.1	22,960,038
Cigars.....(No.)	1,039,822,996	14.1	7,353,221,840

(a) This is manufactured for export in bonded warehouses, Class 6, and is not included in the lump figures showing exports in recent Annual Reports of the Internal Revenue Bureau. For fiscal year 1906—total export cigarettes was 1,710,939,000; for 1907—1,998,095,000 (Com. & Nav., U. S. 1907, p. 768). British-American produced in bonded warehouses, Class 6, for calendar year 1906—cigarettes, 1,912,532,900; for 1907—1,805,117,150. The Reports Comr. Int. Rev. (1906, p. 110; 1907, p. 67) show that there was exported from the United States cigarettes weighing less than 3 lbs. to the thousand and not made in Class 6 warehouses for fiscal years 1906 and 1907—96,057,700 and 48,593,500. There is nothing to show who manufactures the exports not made in bonded warehouses; but Vice President Harris said *nearly all* the tobacco products sent abroad are produced by defendants.

Defendants are parties to contracts, combinations, and conspiracies in restraint of commerce, have monopolies of tobacco products (except cigars), licorice, and tinfoil, and have destroyed competition and obtained undue power in commerce in cigars, boxes, cloth containers, tobacco extracts, jobbing, retailing, etc.; they are also engaged in the manufacture of machinery, pipes, smokers' supplies, in advertising schemes, insurance, planting, etc. Enormous profits have accrued; and defendants James B. Duke and associates have been the leaders in bringing about the present status.

The defendants have persistently exercised duress, have practiced wicked and unfair methods, and used their great power in oppressive ways, and they have been actuated by a fixed purpose to destroy competition and obtain monopolies. Competitors have gradually disappeared, and the combination, now strongly entrenched, unduly restricts the business of those in the trade and prevents others from entering.

The petition sets out the facts with circumstantiality and alleges an expanding accomplished purpose to restrain commerce and acquire monopoly. It prays that the arrangements amongst defendants be declared illegal and that they be enjoined; that the Imperial Tobacco Company be prohibited from doing business in the United States until the unlawful agreements between it and the American companies are rescinded; that the British-American Tobacco Company be adjudged an instrument for effectuating

an unlawful arrangement, and be enjoined; that The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, and The Conley Foil Company be adjudged unlawful combinations and in possession of monopolies and be enjoined from carrying on interstate or foreign commerce; and that holding stock by one defendant corporation in another be prohibited.

The Imperial Company claims that it is a foreign corporation; that the agreements with the American companies were lawful in England where made (its answer contains no such averment); that no material restraint of trade resulted from them; that if any did occur it was occasioned by *bona fide* sales of property in due course. The British-American Tobacco Company claims it is a foreign corporation legitimately organized to buy property and that it does not operate in conflict with law.

The other defendants deny purpose to restrain or monopolize commerce; maintain that State charters gave the corporations the right to purchase the property acquired; that they are engaged in manufacture and any combination amongst them relates only thereto; and that none of them has acquired a monopoly.

The decree dismissed the petition as to the individual defendants, the United Cigar Stores Company, the Imperial Tobacco Company, and the British-American

Tobacco Company and its subsidiaries; adjudged the other defendants parties to combinations in restraint of commerce and enjoined them; adjudged The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company and MacAndrews & Forbes Company unlawful combinations and enjoined them from engaging in interstate commerce; and prohibited the control of certain defendants by others through stock ownership, etc. Injunction was suspended pending appeal.

II.

Concerning the extent of Congressional power under the commerce clause.

The Argument—

What constitutes and what materially affects interstate and foreign commerce are practical questions to be decided upon a view of the particular rights involved in each case.

The commerce clause grants to Congress power to regulate, that is to prescribe rules, or, what is the same thing, to indicate its will, in conformity to which interstate and foreign commerce shall be carried on. This power is complete in itself, may be exercised to the utmost extent, and acknowledges no limitations other than those contained in the Constitution. It extends to whatever is itself such commerce, the instrumentalities thereof, and persons engaged therein; and the will of Congress in respect of these is the supreme law unless shown to conflict with some constitutional provision.

The grant confers on Congress power not only to indicate but also to enforce observance of its will. This will may be materially interfered with by what is no part or instrumentality of interstate or foreign commerce, or by the actions of persons not engaged therein. Accordingly, so far as reasonably necessary to prevent this interference, Congress may enact valid laws which operate directly on such things.

In order to satisfy the requirements of a reasonable necessity, there must be a certain nearness of relationship between what the statute directly strikes and interstate or foreign commerce which is probably not susceptible of rigorous definition. Mere indirect, incidental or remote effect on commerce is not sufficient; but whatever, as a natural and probable consequence, will occasion material hindrance to the efficacious operation of the lawful will of Congress in reference thereto is near enough.

Congress has the right to declare the public policy and economic theory of the country. It is the duty of the courts to accept and seek to promote the due operation of a policy or theory so declared; and they should give full weight thereto when called on to determine the effect on commerce which may result from any prohibited thing.

* * * * *

This court has many times decided whether, under the circumstances presented and in respect of the rule invoked, certain things constituted parts of interstate or foreign commerce or materially obstructed

its free flow; and the opinions support the postulate that these are practical questions to be solved upon consideration of the facts of each case. *Gloucester* v. *Pennsylvania*, 114 U. S., 196; *Robbins* v. *Shelby County*, 120 U. S., 489; *Caldwell* v. *North Carolina*, 187 U. S., 622; *Austin* v. *Tennessee*, 179 U. S., 343; *American Express Co.* v. *Iowa*, 196 U. S., 133; *Cook* v. *Marshall County*, 196 U. S., 261; *Swift & Co.* v. *United States*, 196 U. S., 375, 398; *Rearick* v. *Pennsylvania*, 203 U. S., 507, 512; *Western Union Tel. Co.* v. *Kansas*, 216 U. S., 1; *International Text Book Co.* v. *Pigg*, 217 U. S., 91; *Alfred Dozier* v. *Alabama*, 218 U. S., 124; *St. Louis, &c., R. R.* v. *Arkansas*, 217 U. S., 136.

Most of the cases in this line have grown out of supposed conflict between a State statute and the will of Congress; and the court recognizing that while "the power of Congress to regulate commerce is undoubtedly a beneficent one, the police laws of the State are equally so," has sought to harmonize them in a practical way, permitting each to operate within its proper sphere. *Cook* v. *Marshall County*, 196 U. S., 273. Neither the general expressions in the opinions touching commerce nor the conclusions announced in respect of what constitutes a regulation or hindrance of it should be accepted as entirely applicable and conclusive when the actions of individuals are under consideration and no occasion exists for harmonizing beneficent powers. Of necessity a certain latitude of results has been permitted to statutes of sovereign States and they have been

allowed to affect interstate commerce to a degree not tolerable if occasioned by individuals acting in combination.

In *Kidd* v. *Pearson*, 128 U. S., 1, it was held that an Iowa statute prohibiting the manufacture of liquor (a thing long regarded as peculiarly subject to police regulation), although intended for shipment beyond the State, did not unlawfully burden or hinder interstate commerce. But it does not follow from this that the manufacture of beer for the express purpose of complying with orders already received from another State can never for any purpose be regarded as part of interstate commerce and that individuals can combine and without possible Federal interference set about by force to prevent all brewing. Nor does it follow that Congress has no power to prohibit the operations of a combination of individuals expressly organized to destroy or subject to their arbitrary control existing and essential interstate commerce in a necessity of life by securing dominion over all sources of its manufacture.

Similar observations would be applicable to *Coe* v. *Erol*, 116 U. S., 517, and other cases wherein the taxing power of a State was under consideration.

The boundary lines of the police and taxing powers of a State do not mark out a realm where there may never be found any part of interstate commerce, national in character and susceptible of one uniform system or plan of regulation. A State statute making it unlawful for an engineer to operate an interstate

train until examined and licensed by a board appointed by the governor was upheld in *Smith* v. *Alabama*, 124 U. S., 465, 479. Concerning the things directly affected by the statute the court there said:

> It would, indeed, be competent for Congress to legislate upon its subject-matter and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce.

It is settled that in the absence of a Federal statute a State may regulate certain rights, duties, and liabilities of persons engaged in interstate commerce; and this although all are susceptible of control through general rules enacted by Congress and certainly are not of mere local concern. *Sherlock* v. *Alling*, 93 U. S., 99; *Welton* v. *Missouri*, 91 U. S., 275, 282; *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S., 368, 378; *Hall* v. *Du Cuir*, 95 U. S., 485; *Howard* v. *Ill. C. R. R.*, 207 U. S., 462; *Chiles* v. *C. & O. R. R.*, 218 U. S., 71; *Western Union Tel. Co.* v. *Milling Co.*, Nov. 28, 1910.

In *Swift* v. *The United States*, 196 U. S., 375, 398, 399, 400, Mr. Justice Holmes, speaking for the court, pointed out that in view of the established course and current of commerce among the States the purchase of cattle begun and ended in a single State was a part of interstate commerce. He said also:

> But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but

> depends upon whether the tax so far affects that commerce as to amount to a regulation of it. * * * But we do not mean to imply that the rule which marks the point at which State taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States.

In the typical constantly recurring course of affairs, commerce amongst the States passes through three stages: Soliciting orders in one State for goods to be shipped from another; manufacturing the goods so ordered; transporting them after manufacture from the State where produced to the purchaser. Each of these while in a sense separate is an essential part of the whole movement and depends upon the others. Together they make up a connected whole, constitute a current of commerce among the States, and the same individual may participate in all. Under *Robbins* v. *Shelby County*, 120 U. S., 489, and the cases following it, soliciting the orders is undoubtedly interstate commerce; and clearly transporting the manufactured article from the State of production is also of the same. The manufacture of the goods is quite as essential to the current of commerce as the other characteristic elements; some restrictions upon it affect the very foundations of interstate trade; and we submit that logically a hard and fast line can not be drawn around all manufacture with the conclusion that for no purpose and under no circumstances can

it ever be regarded as part of commerce. The well-established course of business and everyday experience are entirely out of harmony with such a result, and the reasoning in *Robbins* v. *Shelby County*, is to the contrary.

This view takes nothing from the States, and no more subjects production in every aspect to federal control than *Swift* v. *United States*, brings thereunder for all purposes every contract made and fully executed in one State. Because production may be viewed as separable from commerce when necessary to sustain the police power of the States over their internal affairs, it does not follow that it may not also be viewed in its other relation as an essential part of the course of trade and commerce among the States when necessary to the due exercise of the power of Congress to regulate such commerce.

The agreements, combinations, and monopolies complained of in the present proceeding directly affect and bring under one control commerce which for a long time in the customary course has been passing through the three stages above specified; and they directly affect, restrain, and monopolize not alone the manufacture but in connection therewith the purchase and sale of the manufactured commodities among the several States.

* * * * *

No extended argument is required to establish that Congress has power by indicating its will to prescribe

valid rules for interstate and foreign commerce subject only to the restrictions of the Constitution, and that these may be extended to whatever is itself such commerce or an instrumentality thereof or a person engaged therein. So much now seems beyond disputation; and accordingly, when what is directly legislated about is any of the things specified and no constitutional provision is infringed, the validity of the act is clear. *Gibbons* v. *Ogden*, 9 Wh., 1; *Welton* v. *Missouri*, 91 U. S., 275; *Sherlock* v. *Alling*, 93 U. S., 99; *Mobile Co.* v. *Kimball*, 102 U. S., 691; *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447; *In re Debs*, 158 U. S., 564; *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S., 690, 700; *Champion* v. *Ames*, 188 U. S., 321; *Northern Securities Case*, 193 U. S., 197; *Johnson* v. *Southern Pacific Co.*, 196 U. S., 1; *Delaware & Hudson R. R. Co.* v. *United States*, 213 U. S., 366; *Western Union T. Co.* v. *Kansas*, 216 U. S., 1. For the limitations of this power, see: *Howard* v. *Illinois Central R. R.*, 207 U. S., 463, 495; *Adair* v. *United States*, 208 U. S., 161; *Keller* v. *United States*, 213 U. S., 138.

On this general subject attention is called to an excellent article by F. J. Goodnow, Esq., in Political Science Quarterly for June, 1910.

* * * * *

That a constitutional power may be made effective by all means reasonably necessary and that Congress has wide discretion in respect of them is plain. *McCullough* v. *Maryland*, 4 Wh., 316; *Brown* v.

Maryland, 12 Wh., 419, 436; *Prigg* v. *Pennsylvania*, 16 Peters, 535, 608; *The Daniel Ball*, 10 Wall., 557; *Juilliard* v. *Greenman* (Legal Tender Cases), 110 U. S., 421; *California* v. *Central Pacific R. R. Co.*, 127 U. S., 1; *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447; *Champion* v. *Ames*, 188 U. S., 321; *Howard* v. *Illinois Central Ry.*, 207 U. S., 462, 495; *District of Columbia* v. *Brooks*, 214 U. S., 138, 150; *Ling Su Fan* v. *United States*, decided November 14, 1910. The general principle is the same as that applicable to State statutes. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S., 112.

Experience demonstrates that a rule properly prescribed—the indicated will of Congress—may be hindered, obstructed, or nullified by what is no part of commerce. There must therefore be power to prevent such obstruction; otherwise its will is not supreme. Accordingly a State statute, the direct consequence of which is the material obstruction of the free flow of interstate commerce, is invalid. *Western Union T. Co.* v. *Kansas*, 216 U. S., 1; *St. Louis, etc., R. R.*, v. *Arkansas*, 217 U. S., 136. A bridge or dam which obstructs or impedes navigation can be prohibited. *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S., 690, 700; *Union Bridge Co.* v. *United States*, 204 U. S., 364. A combination of individuals to destroy or materially hinder interstate trade can be broken up. *In re Debs*, 158 U. S., 564; *Northern Securities Case*, 193 U. S., 197; *Loewe* v. *Lawlor*, 208 U. S., 274.

* * * * *

While without doubt some things no part of but which affect commerce may be prohibited by legislation aimed directly against them, Congress certainly can not regulate what only relates to interstate or foreign commerce in an incidental or remote way. To define in advance the exact line of demarcation is impossible—each case must be resolved as it arises. On the one hand the limit must not be placed at a point which would render Congress impotent to protect its proper rules; on the other, it is necessary to avoid a latitude which would bring the regulation of all human affairs within Federal power.

A somewhat similar difficulty, concerning liability for negligence, is met by the rule announced in *Milwaukee and St. Paul Ry. Co.* v. *Kellogg*, 94 U. S., 469, 474, 475, under which one is liable when the injury was the natural and probable consequence of his wrongful act. In that case Mr. Justice Strong, in behalf of the court, said:

> The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott* v. *Shepard* (Squibb case), 2 W. Bl., 892. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to

make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?

See also *Schlemmer* v. *Railroad*, 205 U. S., 112; *Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S., 159.

We submit that under the power granted by the commerce clause, Congress may prohibit whatever as an efficient cause will probably occasion, as a natural and reasonable consequence material obstruction or hindrance to efficacious operation of its lawful will. In the law of torts long experience has compelled the doctrine that liability flows from the efficient cause and is not confined to that nearest to the injury. A similar imperious necessity requires acceptance of the principle now advocated.

When considering alleged conflict with the will of Congress this court has often said that a State statute is invalid if its *direct* result is unduly to obstruct the free flow of interstate commerce. In these opinions "direct" was used in contradistinction to immaterial, incidental, or remote, and should be understood as having reference to the efficient cause. In order effectively to enforce observance of its will, manifestly Congress must have power to reach any such cause of a material interference with it. *Northern Securities Co.* v. *United States*, 193 U. S., 197.

If, therefore, it be assumed that production is so distinct from commerce as never to be viewed as a part of it, the inability of Congress to prohibit monopoly of production would not follow as a necessary

consequence. Such a monopoly is often brought about by those engaged in interstate commerce and in harmony with their express purpose does as the efficient, proximate cause, obstruct or completely destroy the operation of the will of Congress in regard thereto. Unless the power of Congress is broad enough effectively to reach this situation, it is in no proper sense supreme.

This reasoning involves no assertion of Federal power generally to regulate or control production or manufacture within the States. It leaves those subjects just where they have always been and must remain—with the State governments. *Kidd* v. *Pearson*, 128 U. S., 1. It only asserts power to debar those engaged in production or manufacture from acts or transactions the direct and necessary consequences of which would be to nullify rules for the conduct of interstate commerce admittedly within the power of Congress to prescribe. And this is but to say that the power is real, supreme. "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence." *McCullough* v. *Maryland*, 4 Wh., 408, 427.

There is a radical difference between permitting Federal power derived from the commerce clause to operate on subjects not of commerce for the essential ends above indicated and its unrestricted extension to anything affecting the same. And we submit, with diffidence, that failure to give adequate weight

to this distinction and fully to recognize that the power to regulate commerce, for limited purposes and under the circumstances pointed out, authorizes legislations touching what is no part thereof caused the majority to hold in *U. S.* v. *E. C. Knight Co.* that the act prohibiting contracts, combinations, and monopolies in restraint of interstate commerce did not apply to a monopoly of sugar refineries which distributed their output therein.

In that case Chief Justice Fuller said:

> That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State,

and throughout the opinion the same idea is repeated, showing that in his view to sustain the power of Congress to prohibit a combination in or monopoly of manufacture necessarily involved deciding manufacture to be commerce, with the result—

> that Congress would be invested, to the exclusion of States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. * * * The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and would be local in all the details of their successful management.

Of course, a conclusion thought to involve such a momentous change in our Government appeared intolerable; and it is at least a fair inference that but for this suggested alternative the court would never have denied the power of Congress to prohibit a monopoly of manufacture which necessarily suppressed existing competition in the sale and distribution of the product in interstate commerce. To uphold the power to the extent here proposed does not, we think, involve the conclusion that manufacture is commerce and therefore subject generally to regulation by Congress, but leaves it where always supposed to be—under the control of the States. *Standard Oil Co.* v. *Tennessee*, 217 U. S., 413.

Some opinions in support of the doctrine advanced follow:

In *Gibbons* v. *Ogden*, 9 Wh., 1, 195, 208, 209, the Chief Justice used this language:

> (195) The genius and character of the whole Government seem to be that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government.
>
> (208) A State, it is said, or even a private citizen may construct lighthouses. But gentlemen must be aware that if this proves a power in the State to regulate commerce, it

proves the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce and may, we presume, be restrained if exercised so as to produce a public mischief.

McCullough v. *Maryland*, 4 Wh., 316, 408, 409.

That instrument (the Constitution) does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the existence of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers.

(426) A power to create implies a power to preserve. A power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and to preserve.

(427) It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence.

Brown v. *Maryland*, 12 Wh., 419, 446, 447.

It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied by the power to authorize a sale of the thing imported?

United States v. *Coombes*, 12 Pet., 72, 78.

This was an indictment in the United States Circuit Court for stealing goods, theretofore removed from a wreck while lying within New York State above high-water mark; and the question was whether the power of Congress under the commerce clause was broad enough to reach such an act. The indictment was sustained, and Mr. Justice Story, for the court, said:

> The power to regulate commerce includes the power to regulate navigation as connected with the commerce with foreign nations and among the States. * * * It does not stop at the mere boundary line of a State; nor is it confined to acts done on the water or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the States. Any offense which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress under its general authority to make all laws necessary and proper to execute their delegated constitutional powers.

The Daniel Ball, 10 Wall., 557.

An indictment for failing to procure a federal license for a vessel navigating wholly between points in Michigan was sustained in an opinion by Mr. Justice Field, wherein he said:

> (564) That power (to regulate commerce) authorizes all appropriate legislation for the

> protection or advancement of either interstate or foreign commerce and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. * * *
>
> (566) We are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States when that agency extends through two or more States and when it is confined to its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated.

See also *In re Debs*, 158 U. S., 564; *Union Bridge Co.* v. *United States*, 204 U. S., 364; *Loewe* v. *Lawlor*, 208 U. S., 274; *Monongahela Bridge Co.* v. *United States*, 216 U. S., 177.

When experience shows that certain acts, whether by state or individuals, naturally result in the obstruction or defeat of its lawful will, Congress of necessity has power to inhibit them; otherwise it can not effectually regulate commerce. To hold that the very last step in a plan to obstruct must be taken

before the power can be exercised would in effect deny it. Some right of anticipation is essential and a dangerous probability of unlawful consequences is enough to give occasion for interposition.

* * * * *

Obviously different minds may reach opposing conclusions as to whether material hindrance or obstruction to the will of Congress in respect of commerce will result from acts constituting no part of it according to the views of economic laws, public policy, etc., which they accept as well founded. If, for example, Congress should in terms declare that the free flow of commerce between the States shall not be obstructed, one who regards monopoly as an aid to trade would conclude that its existence did not violate the prescribed rule; a different conclusion would be reached by one who believes that competition is the life of trade and to suppress this hinders trade. Where matters of economic opinion or theory are elements for consideration and conclusions depend on them the courts must accept whatever declaration in respect of them Congress has made and frame their judgments in harmony therewith, unless it should appear that the declaration is without any reasonable foundation. *Northern Securities Case*, 193 U. S., 197; *National Cotton Oil Co.* v. *Texas*, 197 U. S., 115; *C. & O. Fuel Co.* v. *U. S.*, 115 Fed., 610, 619.

See also—*Arnold* v. *United States*, 147 U. S., 494, 497, 498; *Tide Water Oil Co.* v. *United States*, 171 U. S., 210, 219.

III.

Contracts, combinations, and monopolies which directly and materially hindered or obstructed interstate or foreign commerce were unlawful prior to the act of July 2, 1890.

The American Tobacco Company began business in January, 1890, prior to the Sherman Act. Nevertheless it appears desirable to show its original status was unlawful and that present conditions are not the mere orderly outcome of an enterprise rightfully undertaken.

Two lines of reasoning support the proposition—

(A)

In *Western Union Telegraph Company* v. *Call*, 181 U. S., 92, 102—a suit seeking damages for unlawful discrimination—the Telegraph Company unsuccessfully claimed that no liability could be enforced because the complaint related to interstate commerce subject to regulation by Congress alone, and there was no applicable Federal statute. Speaking by Mr. Justice Brewer, this court said—

> Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this can not be so, and that the principles of the common law are operative upon all interstate commercial transactions. * * *

Beyond serious doubt, without congressional enactment, every contract, agreement, combination, or

monopoly, unlawful at common law, would be so regarded by the Federal courts although it related solely to interstate or foreign commerce. And certainly no court would affirmatively aid the purposes of any of them. "There is no doubt that * * * 'at common law every person has individually, and the public also has collectively, a right to require that the course of trade shall be kept free from unreasonable obstructions'" *Loewe* v. *Lawlor*, 208 U. S., 294.

(B)

The Constitution gives Congress power "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Except as limited by other provisions, this power is supreme and can not be abridged by State, individual, or corporation.

In *Leisy* v. *Hardin*, 135 U. S., 100, the Chief Justice, speaking for the court, laid down the following propositions—

> (109) Inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammeled. * * *
>
> (119) Where the subject matter is national in its character, and admits and requires uniformity of regulation affecting alike all the

> States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. * * *
>
> The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States can not exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce.

In *Vance* v. *Vandercook*, 170 U. S., 438, 444, this court, speaking by Mr. Justice White, said:

> Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a State law which denies such a right, or substantially interferes or hampers the same, is in conflict with the Constitution of the United States.

See also—*Re Rahrer*, 140 U. S., 545; *Rhodes* v. *Iowa*, 170 U. S., 412; *Adams Express Co.* v. *Kentucky*, 206 U. S., 129, 135; *Atlantic Coast Line* v. *Whorton*, 207 U. S., 328, 334; *Adams Express Co.* v. *Kentucky*, 214 U. S., 218; *Western Union T. Co.* v. *Kansas*, 216 U. S., 1.

The doctrine that congressional inaction concerning interstate and foreign commerce is equivalent to a positive declaration that it shall be "free and untrammeled" and that whatever "substantially interferes with or hampers the same is in conflict with the Constitution of the United States" rests upon the intention of Congress "reasonably implied from its silence in respect to the subject of commerce." *Bowman* v. *Chicago, etc., R. R. Co.*, 125 U. S., 465, 482.

Within settled principles of the common law, contracts, combinations, conspiracies, and monopolies may prevent the free flow of commerce—substantially interfere with and hamper the same.

If a State statute which hampers or substantially interferes with commerce is invalid because in conflict with the contrary intention of Congress reasonably implied from its silence, *a fortiori* must this be true of arrangements by corporations which bring about like results.

A State by legislation can not directly obstruct commerce and certainly can not so empower a corporation. Obviously, also, combinations of individuals or corporations have no right so to do; otherwise the declaration by Congress that commerce shall be free could be nullified and its supremacy would not exist. It follows that even in the absence of express legislation all combinations and monopolies which in fact directly and materially restrain or obstruct interstate or foreign commerce would be unlawful.

In *Re Debs*, 158, U. S., 564, 577, 599, the United States finding interstate transportation of persons and

property and carriage of the mails forcibly obstructed, and that a combination and conspiracy existed to subject them to the will of the conspirators applied to a court of equity to restrain the obstruction and prevent the carrying of the conspiracy into effect. This court held that the Constitution imposes upon the National Government the duty to keep the avenues of commerce free; that in the absence of positive congressional legislation obstructions upon the highways to the passage of interstate commerce were unlawful and the Government could appeal to the courts to remove them. A sweeping injunction was accordingly upheld.

Speaking for the court, Mr. Justice Brewer said—

> (581) It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of State legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

See also—*Union Bridge Co.* v. *U. S.*, 204 U. S., 364; *Galveston R. R.* v. *Texas*, 210 U. S., 217; *Caldwell* v. *N. C.*, 187 U. S., 622.

We submit that before the act of 1890, contracts, combinations, and monopolies which in effect or necessary tendency directly and materially obstructed, hindered, burdened, or restrained interstate or foreign commerce were unlawful. It is unnecessary to discuss what powers the courts then had to prevent them by affirmative action or whether parties thereto were guilty of criminal offences.

IV.

The antitrust provisions of the Wilson Tariff Act (1894) apply to any combination or agreement intended to restrain free competition when one of the parties is engaged in importing.

These provisions—sections 73 to 77 (Appendix B)—have not been construed by this court. They declare illegal every combination, conspiracy, trust, agreement, or contract, one party to which is engaged in importing, when intended to restrain lawful trade or commerce or free competition therein, or to increase the market price of any article imported or intended to be imported, or any manufacture into which such imported article enters or is intended to enter. The language declaring what is unlawful differs in some respects from the Sherman Act—not improbably because of certain opinions of the lower Federal courts concerning it. *In re Green*, 52 Fed., 104; *United States* v. *Trans-Missouri Freight Ass'n*, 53 Fed., 440, 58 Fed., 58; *United States* v. *E. C. Knight Co.*, 60 Fed., 934.

The things denounced must, of course, directly relate to and materially affect interstate or foreign

commerce; and so construed, we submit the provisions are valid.

The manifest object was to prohibit arrangements destructive of free competition, and in this regard the later act accentuates the purpose of the earlier one.

V.

The Sherman Act prescribes the rule of free competition in its broad and general sense and denounces contracts, combinations, and conspiracies in whatever form which in effect or necessary tendency directly and materially obstruct interstate or foreign commerce. The natural effect of competition is to increase commerce; to extinguish or prevent the free play of competition is to hinder it.

The legislative history of the Sherman Act may be found in "Bills and Debates in Congress relating to Trusts" published from the Government Printing Office in 1903. It has been the law without amendment for twenty years, and during that time Congress has often indicated special desire for its enforcement. Act February 11, 1903; act February 25, 1903; act March 3, 1903 (32 Stat., 823, 854, 1031, 1062); act June 25, 1910. (Ch. 428.)

The rights of an individual acting alone are not involved in the present controversy, and discussion of them will not be entered upon. Opinion of Mr. Justice Brewer in Northern Securities Case. It is settled in this court that different rules may apply to the acts of one individual and to those of many in combination.

SEC. 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with

foreign nations, is hereby declared to be illegal." This is constitutional, means something, and must be enforced by the courts according to its fair intent. *Swift* v. *United States*, 196 U. S., 375, 396. The time has passed for objections bottomed on the invalidity of the act or mere difficulty in enforcing it.

No attempt will be made to point out the exact bounds of the antitrust statutes—our concern is with the facts of this case. But we will undertake to show that the record reveals gross violations of them within any construction consistent with repeated decisions of this court and indeed within any interpretation ever announced by a member of this court. If the express terms of the Sherman Act limited its prohibitions to *unreasonable* restraints of commerce, the present case would be clearly within it. If wrongful intent, duress, oppression, or wicked and unfair methods are essential, they all appear. Unless industrial combinations and monopolies brought about through corporations are exempt, the defendants are in flagrant conflict with the law. The defendants' actions have direct reference to interstate and international commerce and essentially obstruct the same.

"Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all

its forms, including transportation, purchase, alse and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted." *Hopkins* v. *United States*, 171 U. S., 578, 597; *Swift & Company* v. *United States*, 196 U. S., 375.

"Regulation and commerce among the States both are practical, rather than technical, conceptions, and, naturally, their limits must be fixed by practical lines." *Galveston R. R.* v. *Texas*, 210 U. S., 217, 225.

"Transactions between manufacturing companies in one State, through agents, with citizens of another, constitute a large part of interstate commerce." *Caldwell* v. *North Carolina*, 187 U. S., 622, 632; *Rearick* v. *Pennsylvania*, 203 U. S., 507, 512.

A manufacturer who fabricates hats in Connecticut, sells and ships them to wholesalers in other States, is engaged in interstate commerce, and a combination which directly and materially (essentially) hinders such business is an unlawful interference with interstate commerce. *Loewe* v. *Lawlor*, 208 U. S., 274, 293. See *Bement* v. *National Harrow Co.*, 186 U. S., 70, 92.

The antitrust laws must be reasonably construed with a view to practical enforcement, and not so as to defeat the purposes leading to their enactment. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid

an unjust or an absurd conclusion." *Lau Ow Bew* v. *United States*, 144 U. S., 47, 59; *United States* v. *Joint Traffic Ass'n*, 171 U. S., 505, 567; *Hopkins* v. *United States*, 171 U. S., 578, 600; *Anderson* v. *United States*, 171 U. S., 604, 616; *Swift & Company* v. *United States*, 196 U. S., 375, 396; *Cincinnati Packet Company* v. *Bay*, 200 U. S., 179, 184.

The decisions establish that "restraint" is not used in the statute in mere contrast or opposition to enlarge, expand, or increase. The restraint of the statute is not a mere antonym to enlargement; and trade may be restrained although its volume is expanding. The *Trans-Missouri Freight Case*, 166 U. S., 290, 323; the *Addyston Pipe Case*, 175 U. S., 211, 244, 245; *C. & O. Fuel Co.* v. *United States*, 115 Fed., 610. Moreover, it can not be assumed because commerce in a commodity in fact has increased during a given period that a combination destructive of competition therein has been helpful and not detrimental. The argument opposing affirmance of the decree below based on such an unwarranted assumption and mistaken use of the word "restraint" is too obviously fallacious to require extended comment. (Brief Mr. Cockran.) And similar observations apply to like arguments advanced by others.

The validity of State legislation affecting interstate commerce turns upon whether its direct effect or necessary tendency is the material or substantial restraint, hindrance, or obstruction of such commerce. If so, it is unconstitutional and good intent does not save it. But if the effect on commerce is only

immaterial and incidental this will not invalidate the statute. *Asbell* v. *Kansas*, 209 U. S., 251, 256; *Galveston, &c., R. R.* v. *Texas*, 210 U. S., 217, 227; *Minnesota* v. *Barber*, 136 U. S., 313, 319; *Richmond, &c., R. R. Co.* v. *Patterson*, 169 U. S., 311, 314; *Chicago, &c., R. R.* v. *Solan*, 169 U. S., 133; *Missouri, &c., R. R.* v. *Haber*, 169 U. S., 613, 626; *Bowman* v. *Chicago, etc., R. R. Co.*, 125 U. S., 465, 482; *Smith* v. *Alabama*, 124 U. S., 465, 473. This general principle should be followed when violations of the antitrust law are under consideration, due allowance being made for the necessary latitude of State laws.

The Sherman Act applies when the direct result or necessary tendency of the prohibited thing is the material obstruction, hindrance or restraint of interstate or foreign commerce. This thing need not be any part of commerce nor be done by parties engaged therein, *Loewe* v. *Lawlor*. Whether such obstruction, hindrance, restraint, or tendency exists must be determined by the court in each case presented upon all the facts in evidence; conclusion should depend upon practical, not mere theoretical considerations, and necessarily will be influenced by the status of commerce and the public policy existing at the time. That which did not restrain commerce fifty years ago may do so to-day. *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S., 1–9; *Union Bridge Company* v. *United States*, 204 U. S., 364, 400; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How., 518, and 18 How., 421.

Persons of sound mind are presumed to intend the necessary or ordinary consequences of their acts, *Clarion Bank* v. *Jones*, 21 Wall., 325, 337; and, in general, the intent or purpose consciously entertained or dominant in the minds of the parties to a combination is not material when hindrance or restraint to commerce actually results therefrom—certainly is not decisive of its legality. Where attempts to monopolize are charged, or where it is essential to show a plan not necessarily inferred from the circumstances, or where the effect of established acts may be doubtful, the actual conscious purpose of the parties may be material—perhaps essential. *U. S.* v. *Trans. Mo. Ft. Assn.*, 166 U. S., 290, 341, 342; *Addyston Pipe Co.* v. *United States*, 175 U. S., 211, 234; *Swift & Co.* v. *United States*, 196 U. S., 375, 396.

The E. C. Knight case turned upon the conclusion by the court that what was alleged and proved did not directly or necessarily obstruct interstate commerce; and may be relied upon only where the evidence requires a like finding on that point.

A combination is "the union or association of two or more persons (or corporations) for the attainment of some common end." Century Dictionary; Noyes on Intercorporate Relations, sec. 302.

A conspiracy is sufficiently described as "a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some

purpose not in itself criminal or unlawful by criminal or unlawful means." *Pettibone* v. *United States*, 148 U. S., 197, 203; *Noyes on Intercorporate Relations*, secs. 324 *et seq.*

"An act harmless when done by one may become a public wrong when done by many, acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished if the result be hurtful to the public, or to the individual against whom the concerted action is directed." *Grenada Lumber Co.* v. *Miss.*, 217 U. S., 433; *Callan* v. *Wilson*, 127 U. S., 555, 556; *Smiley* v. *Kansas*, 196 U. S., 447.

It was strenuously urged below that the lawfulness or unlawfulness of a combination of competing concerns must be determined by the main or primary purpose of the parties; that if this is lawful then the actual destruction of competition becomes immaterial. But necessary consequences are presumed to have been intended; and moreover, the fundamental design of the legislation under consideration is not the punishment of immorality but prevention of mischief consequent upon the unification of business and destruction of competition. The public is chiefly concerned about practical results—not mental attitudes. The fallacy of the contention was long since declared by this court. *U. S.* v. *Trans Mo. Ft. Assn.*, 166 U. S. 290; *U. S.* v. *Joint T. Assn.*, 171 U. S., 562; *Addyston Pipe Co.* v. *United States*, 175 U. S., 211, 234.

The word "reasonable" can not be read into the first section of the act and made to qualify "restraint." But this does not render the prohibitions applicable whenever commerce is in some way affected, or to transactions which have never been regarded as objectionable from any standpoint. To insist on a forced construction and then point out consequent impossible conditions is a device too obvious for success. This court has not declared unlawful those ordinary business arrangements always recognized as desirable at common law and wholly outside the mischief intended to be prevented—but distinctly to the contrary. *United States* v. *Joint Traffic Ass'n*, 171 U. S., 505, 567, 568; *Hopkins* v. *United States*, 171 U. S., 578, 600; *Cincinnati Packet Co.* v. *Bay*, 200 U. S., 179. Any act, however, although entirely innocent when standing alone, may be criminal if part of an unlawful plan. *Swift & Company* v. *United States*, 196 U. S., 375, 396; *Aikens* v. *Wisconsin*, 195 U. S., 194, 205; *Grenada Lumber Co.* v. *Miss.*, 217 U. S., 433.

We do not maintain that *every* sort of restraint of interstate or foreign commerce is denounced by the Sherman Act; and certainly no such doctrine is essential to the relief asked. But when, as in the present case, the restraint is a direct consequence of, or that to which the challenged contract, combination, or conspiracy necessarily tends, and also of a material or substantial character, it is clearly within the meaning of the statute. Of course, we do not insist that *every* contract or arrangement which

causes the elimination of a competitor in interstate trade is necessarily unlawful. The statute was intended to foster, not destroy, business operations universally regarded as promotive of the public welfare.

Accordingly, we do not avouch and will not attempt to support the extreme construction of the act adopted by the presiding judge below under which he declared, in substance, that it would be unlawful for any two individuals driving rival express wagons between villages in contiguous States to combine forces by forming a partnership, or otherwise, and operate a single line; or by contract "to deprive the country of the services of any number of independent dealers, however small" (R. I., 291, 292).

The statement of our position seems to render unnecessary any further reply to the arguments in the brief of Messrs. Thacher & Kirlin, which is confined to combating the suggestion that the Sherman Act prohibits "*every* contract or combination in restraint of competition."

Contracts, conspiracies, or combinations which give power materially to restrain interstate commerce and indicate a dangerous probability of its exercise, and those which necessarily tend to monopoly or material restraint of such commerce, are unlawful without more. *E. C. Knight Case; Pearsoll Case; Trans-Missouri Freight Ass'n Case; Northern Securities Case.* The essential purpose of the statute is to prevent injury—not merely to reverse a course of

conduct. The evidence, however, clearly shows that acting in concert the defendants have exercised coercion and duress and have practiced unfair, oppressive, and wicked trade methods. See *post*, Part XII.

* * * * *

Some opinions which support the leading proposition announced above, denounce devices destructive of competition and negative the insistence in defendants' behalf, with comments thereon, follow.

United States v. *E. C. Knight Company* (1895), 156 U. S., 1—

If this opinion has not been overruled in effect (as the minority in the Northern Securities Case seemed to conclude), certainly subsequent ones require that its authority be confined to precisely similar controversies where the same remedy is sought and the proof necessitates the same conclusion which the court therein announced as to the effect of the assailed arrangement upon commerce.

The American Sugar Refining Company, engaged in manufacturing and selling sugar, by exchanging shares, acquired all stock of competing concerns at Philadelphia, and thereby control of the manufacture of 90 per cent of the sugar refined and sold in the United States, and a monopoly of such manufacture. There were no covenants by vendors against competition; no stipulations in terms relating to commerce; and no concert of action amongst vendor stockholders in different corporations; "nothing looking to a transaction in the nature of interstate commerce" (*Addys-*

ton Pipe Case, p. 239). The thing attacked was the acquisition of stocks and "the relief sought was the surrender of property which had already passed and the suppression of monopoly in manufacture by the restoration of the *status quo* before the transfers."

The Chief Justice, speaking for the court, said:

> (10) The monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life. * * * (11) The fundamental question is whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill. * * * (12) The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large population of the United States interstate commerce is indispensable, and that, therefore, the General Government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. * * * Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not

> control it, and affects it only incidentallyy and indirectly. * * * (17) The contractss and acts of the defendants related exclusivebly to the acquisition of the Philadelphia refinneries and the business of sugar refining in PPennsylvania, and bore no direct relation to ‹ commerce between the States or with fobreign nations. * * * There was nothing inn the proofs to indicate any intention to pout a restraint upon trade or commerce, andd the fact, as we have seen, that trade or commmerce might be indirectly affected was not enouggh to entitle complainants to a decree. The suhbject matter of the sale was shares of manufactuuring stock, and the relief sought was the surreender of property which had already passed andd the suppression of the alleged monopoly in mnanufacture by the restoration of the *status quao* before the transfers, yet the act of Congress ‹ only authorized the circuit courts to proceed by, way of preventing and restraining violations obf the act in respect of contracts, combinationas, or conspiracies in restraint of interstate or iinternational trade or commerce.

In the language quoted, the court announceed its conclusion that the evidence failed to show the trransactions complained of directly or necessarily affeected commerce. This, of course, necessitated dismisssal of the bill. Justice Harlan thought that the proobf did establish direct material obstruction to commercee and accordingly dissented. Referring to this casse in *Loewe* v. *Lawlor*, the Chief Justice said "the urndisputed facts showed that the purpose of the agreenment was not to obstruct or restrain interstate commaerce.

The object and intent of the combination determined its legality."

It should be noted that the reasoning of the opinion concerns for the most part the provisions of the second section of the Sherman Act; and there may well be a distinction between a monopoly *of* commerce and a monopoly, acquired through a combination, which *directly* and materially restrains, hinders, or obstructs commerce.

Obviously the existence of direct material obstruction to commerce must be determined upon the proof presented in each case—the conclusion must vary with the circumstances. In the Northern Securities case the court held that direct obstruction was established by evidence apparently little more potent than that presented in the Knight case, and the decree undertook to suppress the combination by prohibiting control and use of property which had already passed. In *Loewe* v. *Lawlor*, acts no part of commerce were declared unlawful because of their direct effect; and the same conclusion was also announced in *Swift & Co.* v. *U. S.*, 196 U. S., 375, 397.

The Chief Justice further said:

> (12) Power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

Accordingly whenever the evidence shows that, in reality, a monopoly of manufacture, as the efficient cause, hinders the operation of a rule properly prescribed by Congress for regulating commerce it may be prohibited. And, of course, regarded as a part of commerce, if manufacture be monopolized "the transaction is itself a monopoly of commerce."

This court in numerous opinions has pointed out the limitations of the Knight case and wherein it differs from cases like the present one. Some recent opinions discussing it are *National Fireproofing Company* v. *Mason Builders Ass'n*, 169 Fed., 259; *Pennsylvania Sugar Refining Company* v. *American Sugar Refining Company*, 166 Fed., 254; *Standard Oil Co.* v. *United States*, 173 Fed., 177; *Bigelow* v. *Calumet & Hecla Mining Company*, 167 Fed., 704, 721, 725. In the last-named case, speaking through Judge Lurton (now Mr. Justice Lurton), the court said:

> The Knight Case, in its last analysis, is but a striking illustration of the rule that the monopoly or agreement to come within the act must directly and immediately affect interstate commerce. Confining the case to its facts, it establishes the proposition that a mere combination between manufacturers only, by which a monopoly of a product results, is not, without other special circumstances, sufficient to justify an active intervention under the act to undo a contract by which such a monopoly has been brought about. That the product thus monopolized by such combination of mere manufacturers may ultimately

find itself into the stream of interstate commerce is there held not to be such a special circumstance as to constitute the direct and immediate effect upon commerce among the States as to bring the agreement within the act.

Pearsall v. *Great Northern R. R. Co.* (1896), 161 U. S., 646—

Pearsall, a stockholder of the Great Northern Railroad Company, sought to enjoin execution of a contract which would have given it one-half the shares of the Northern Pacific Railroad Company, in alleged violation of the Minnesota statute prohibiting consolidation of parallel and competing lines. The proposed arrangement was declared unlawful, and speaking for the court, Mr. Justice Brown said:

(670) It is true that upon its face the agreement contemplates principally an interchange of traffic between the lines under joint tariffs (by which is probably meant similar rates to be agreed upon between the parties) in order that the defendant may enjoy the right to ticket its passengers and consign its freight to points upon the line of the Northern Pacific, not reached by the Great Northern, and to that end is also to have the right to make use of the terminal facilities of the Northern Pacific at such points on the line as should be convenient to the defendant. If the sole object of this agreement were to facilitate an interchange of traffic, so that each road might enjoy the benefit of billing its passengers and

freight to points on the other road not reached by it, it would be difficult to foresee any objection to it. But the fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control of the Northern Pacific, is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured.

United States v. *Trans-Missouri Freight Association* (1897), 166 U. S., 290—

In 1889 a number of railroad companies formed themselves into the Trans-Missouri Freight Association "for the purpose of mutual protection by establishing and maintaining reasonable rates," etc. In 1892 the Government filed a bill to have the agreement declared illegal and the association dissolved. It alleged that "contriving and intending unjustly and oppressively to increase and augment the said rates and prices * * * and intending to monopolize the trade, traffic and commerce," they "did combine, conspire, confederate and unlawfully agree together, and did then and there enter into a written contract, combination, agreement and compact,

known as a memorandum of agreement of the Trans-Missouri Freight Association."

The answers admitted formation of the association, but expressly denied unlawful intent or purpose, and alleged that defendant's proper object was to establish reasonable rates, rules and regulations. The cause was heard on bill and answers; and the association declared unlawful.

In an opinion by Mr. Justice Peckham this court held that the Sherman Act applies to railroad companies; that it prohibits all contracts, combinations and conspiracies in whatever form which directly restrain interstate or international commerce; and that its operation can not be limited to those which according to the doctrines of the common law "unreasonably" restrain the same.

The question as to intent was disposed of thus:

> (341) Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself can not be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants; and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken

of the question, the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that its does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

[An unlawful intent in entering into the agreement was immaterial because the agree-

ment in fact and by its terms restrained trade. *U. S.* v. *Joint Traffic Association*, 171 U. S., 505, 561, 563.]

Touching the class of contracts which may in some way affect commerce, the opinion contains this language:

> (329) A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question. But we can not see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the lawmaking body that enacted it.

In reply to the contention that railroads should be exempt from the antitrust law because of peculiar evils arising from unrestrained competition amongst them, this language is used:

> (322) Manufacturing or trading companies may also affect prices by joining together in forming a trust or other combination, and by making agreements in restraint of trade and commerce, which when carried out affect the

interests of the public. * * * It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity and have been induced by motives of individual or corporate aggrandizement as against the public interest. In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital. * * *

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not ma-

terial that the price of an article may be lower. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by rail-

roads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common.

United States v. *Joint Traffic Association* (1898), 171 U. S., 505—

Thirty-one railroad companies engaged in transportation east of Chicago formed an association "to aid in fulfilling the purpose of the interstate commerce act, to cooperate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules, and regulations on state and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." The bill prayed that the agreement be declared illegal and its further execution be enjoined. The cause was heard on bill and answers. The lower court dismissed the bill; on appeal here that action was reversed.

In an opinion by Mr. Justice Peckham, the doctrines announced in the Trans-Missouri Freight Association case were reaffirmed. The court considered and denied the contention that a citizen is deprived of his liberty without due process of law when prohibited by general statute from making a contract the direct effect of which is to restrain interstate commerce and declared that "where the grantees of this public franchise are competing railroad companies for interstate

commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered." "The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce."

Replying to suggestions by counsel, the court further said:

> (567) We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business. * * * To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court.

Hopkins v. *United States* (1898), 171 U. S., 578—

A proceeding under the Sherman Act to dissolve the Kansas City Live Stock Exchange—a voluntary association of commission merchants—and to perpetually enjoin the members from entering into or continuing in any combination of like character.

In an opinion by Mr. Justice Peckham this court held the arrangements complained of were not in their direct effect in restraint of trade or commerce among the several States, and that the record did not show defendants had monopolized or attempted to monopolize any part of such commerce. Among other things, he said:

> (592) The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. * * *
>
> To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a

commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely, although certainly. *Ficklen* v. *Shelby County Taxing District*, 145 U. S., 1. * * *

(594) An agreement may in a variety of ways affect interstate commerce, just as State legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct. * * *

(600) The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements.

Anderson v. *United States* (1898), 171 U. S., 604—

Proceeding against purchasers of cattle who were members of the Traders' Live Stock Exchange alleged to be an unlawful combination in restraint of trade. This court, speaking through Mr. Justice Peckham, denied the Government's contention and held the arrangement evidenced by the by-laws "not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act." He further said:

(615, 616) It has already been stated in the Hopkins case, above mentioned, that in order

to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith* v. *Alabama*, 124 U. S. 465, 473: "There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations." The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended,

should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void. We think, within the plain and obvious construction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid

Addyston Pipe and Steel Company v. *United States* (1899), 175 U. S., 211—

Six corporations engaged in the manufacture, sale and transportation of iron pipe, with places of business in different States, became members of an association which in fact destroyed competition amongst them; they claimed, however, that it was not intended to raise prices beyond what was reasonable but only to prevent ruinous competition. The bill asked that the association be declared unlawful and was sustained by the Circuit Court of Appeals for the Sixth Circuit in an elaborate opinion by Taft, Judge (85 Fed., 271), where the pertinent authorities are collected and discussed. Upon appeal the decree was affirmed, this court being of opinion that the direct and immediate result of the combination was necessarily a restraint upon interstate commerce.

It was urged (among other things) that the power of Congress "does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce." Speaking by Mr. Justice Peckham this court said:

> (228) Under this grant of power to Congress [the commerce clause], that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.
>
> The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person

shall be deprived of life, liberty, or property without due process of law. It has been held that the word "liberty," as used in the Constitution, was not to be confined to the mere liberty of persons, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 572. But it has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States. * * *

(229) If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate, interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them? The private contracts may in truth be as far-reaching in their effect upon interstate commerce as would the legislation of a single State of the same character. * * *

(230) Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is State legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce. * * * Regulation, to any substantial extent, of such a subject by any other power than that of Congress, after Congress has itself acted thereon, even though such regulation is effected by means of private contracts between individuals or corporations, is illegal and we are unaware of any reason why it is not as objectionable when attempted by individuals as by the State itself. * * *

(231) It is, indeed, urged that to include private contracts of this description within the grant of this power to Congress is to take from the States their own power over the subject, and to interfere with the liberty of the individual in a manner and to an extent never contemplated by the framers of the Constitution, and not fairly justified by any language used in that instrument. If Congress has not the

power to legislate upon the subject of contracts of the kind mentioned, because the constitutional provision as to the liberty of the citizen limits, to that extent, its power to regulate interstate commerce, then it would seem to follow that the several States have that power, although such contracts relate to interstate commerce, and, more or less, regulate it. If neither Congress nor the State legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, State or National, which can legislate upon the subject of or prohibit such contracts. This can not be the case.

If it should be held that Congress has no power and the State legislatures have full and complete authority to thus far regulate interstate commerce by means of their control over private contracts between individuals or corporations, then the legislation of the different States might and probably would differ in regard to the matter, according to what each State might regard as its own particular interest. One State might condemn all kinds of contracts of the class described, while another might permit the making of all of them, while still another might permit some and prohibit others, and thus great confusion would ensue, and it would be difficult in many cases to know just what law was applicable to any particular contract regarding and regulating interstate commerce. At the same time contracts might be made between individuals or corporations of such extent and magnitude as to seriously affect commerce among the States. These consequences would seemingly necessarily follow if it were decided that the

State legislatures had control over the subject to the extent mentioned. * * *

(234) If the necessary, direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and, that regulation existing, it is unimportant that it was not designed.

Where the contract affects interstate commerce only incidentally, and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce, is of no importance. We conclude that the plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power, as claimed by the appellants. We therefore think the appellants have failed in their contention upon this branch of the subject.

Replying to the contention that the combination in question did not directly restrain or regulate commerce among the States within the principles announced in the E. C. Knight Case, he further said:

> (240) It was the purpose of the combination to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made. * * *
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> (241) If dealers in any commodity agreed among themselves that any particular territory bounded by State lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? * * * As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. * * * If, therefore, an agreement or combination directly restrains not alone the manufacture

but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute.

(245) Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way as well as its effect upon the volume or extent of the dealing in the commodity that is regarded.

(246) Where the contract is for the sale of the article and for its delivery in another State the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfill his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce and not one relating only to manufacture.

Montague & Company v. *Lowry* (1903), 193 U. S., 38—

A private action for damages under section 7 of the Sherman Act against members of the Tile, Mantel and Grate Association of California, composed of wholesale dealers in that State and manufacturers located in others. The by-laws forbade purchasing from any manufacturer not a member of the association and from selling, except at exorbitant prices, to nonmembers. Judgment below for plaintiffs was affirmed.

Mr. Justice Peckham, speaking for the court, among other things, said:

> (45) The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tile by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tile ceases to be a mere transaction in the State of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce. * * *
>
> (47) The purchase and sale of tile between the manufacturers in one State and dealers therein in California was interstate commerce within the Addyston Pipe Case, 175 U. S. 211. It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, which was an article of commerce between the States. *United States* v. *E. C. Knight Company*, 156 U. S. 1, did not, therefore, cover it. It is not brought within either *Hopkins* v. *United States*, 171 U. S. 578, or *Anderson* v. *United States*, 171 U. S. 604. * * * Upon examination we think it is entirely clear that the facts in the case at bar bear no resemblance to the facts set forth in either of the above cases and are not within the reasoning of either. The agreement directly affected and restrained interstate commerce.

Chesapeake & Ohio Fuel Co. v. *United States* (1902), 115 Federal, 610, 619, 622, 624.

This was a proceeding by the United States against a combination of coal-producing companies with mines in West Virginia. Speaking through Judge Day (now Mr. Justice Day), among other things, the court said:

> (619) By the Constitution of the United States Congress is given plenary power to regulate commerce between the States and with foreign nations. In the exercise of this power, Congress may prevent interference by the States with the freedom of interstate commerce, and may likewise prohibit individuals, by contract or otherwise, from impeding the free and untrammeled flow of such trade. In the exercise of this right, Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. * * * The question is, in each case, does the contract or combination have the necessary effect to restrain interstate commerce? A contract or combination which interferes with the freedom of interstate commerce and hinders or prevents its free enjoyment, to the extent that it does so, restrains that commerce, and is illegal. It was the policy of the common law to discourage monopolies, and to refuse to enforce contracts which had the effect to suppress competition.

It was believed and declared, by those who built up that system of jurisprudence, that the public interests were best subserved when commerce and trade were left unfettered by combinations and agreements which had the effect to destroy competition in whole or in part. It was in the same spirit and with the same end in view that Congress passed the act under consideration, which is aimed to maintain interstate commerce upon the basis of free competition, and contracts which have the necessary tendency to restrain that freedom are within the condemnation of the law. The courts are not concerned with the policy of such a law. It is not for them to inquire whether it be true, as is often alleged, that this is a mistaken public policy, and combinations, in the reduction of cost of production, cheapened transportation and lowered cost to the consumer have been productive of more good than evil to the public. The Constitution has delegated to Congress the right to control and regulate commerce between the States. In the exercise of this right it has declared for that policy which shall keep competition free, and leave interstate commerce open to all, without the right to any to fetter it by contracts or combinations which shall put it under restraint. * * *

(622) And it is argued that the main purpose of this agreement being to increase the trade of the parties, to enhance competition in a larger field and improve the character of the product, these objects are beneficial to the public as well as to the private parties,

lawful in their scope and purpose, and justifying the indirect and partial restraint of trade involved in the execution of the agreement. The argument here advanced would be available to nearly every combination of this kind. Wider markets and more trade may be the inducements to such agreements, but they are purposes which the act of Congress does not permit to interfere with the freedom of interstate traffic. * * *

(624) The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain or impair the freedom of interstate trade. The law reaches combinations which fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity.

Northern Securities Company v. *United States* (1904), 193 U. S. 197—

In pursuance of preliminary agreements amongst stockholders of the Great Northern and Northern Pacific Railroad Companies, the Northern Securities Company was organized in New Jersey as a holding company with $400,000,000 authorized capital and wide powers. By fully executed transfers and conveyances, partly in exchange for its own shares and partly for cash, it became the absolute owner of the majority shares in both railroads. The Government

filed a bill against the corporations, certain individual officers and directors, alleging the arrangement was in violation of the Sherman Act. This court approved an adjudication "that the defendants above named [all of them] have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' denounces as illegal;" enjoined the Northern Securities Company from voting the stocks acquired or undertaking to control the companies issuing the same; and prohibited the railroad companies from permitting such control or voting of stock and from paying dividends to the holding company.

Mr. Justice Harlan, speaking for the court, among other things, said—

> (331, 322) That although the act of Congress known as the antitrust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*
>
> That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but em-

braces *all* direct *restraints* imposed by any combination, conspiracy, or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations, even among *private* manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the antitrust act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce;

That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination in fact results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the

public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

Replying to the suggestion that an order by a Federal court preventing the Northern Securities Company from exercising the power to hold stocks granted by its charter would invade rights of the State, Mr. Justice Harlan further said:

> (345) No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It can not be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. * * * The Federal court may not have power to forfeit the charter of the Securi-

> ties Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. * * * In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce.

A minority of the court dissented upon grounds elaborated in separate opinions by Mr. Justice White and Mr. Justice Holmes.

I. Mr. Justice White said in effect: The mere acquisition and ownership by a holding company of stock in railroad corporations created by a State is not interstate commerce, although the railroads are engaged therein. Consequently, the authority of Congress delegated by the commerce clause does not embrace the power to regulate such acquisition and ownership. The power to limit the quantity and

character of property which may be *acquired and owned* by a corporation belongs exclusively to the States—Congress can only control the *use*. The distinction is between the right to "*acquire and own*" and the right "*to do*" after acquisition. In the Knight case, "as the contract merely concerned the purchase of stock in the refineries and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause the fact that ownership of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership."

The defendants' business is a part of interstate and foreign commerce; the acquired businesses of competing concerns were parts thereof; the contracts, arrangements and plan all directly relate thereto; the use of property acquired and the result of things which defendants are doing every day directly concern and affect the movement of commodities in such commerce; there is here no mere question of ownership. In *Loewe* v. *Lawlor*, 208 U. S., 274, a combination among individuals not themselves engaged in interstate commerce *to do* things constituting no part of such commerce, but which directly restrained it, was declared unlawful in a unanimous opinion; and there can be no doubt that many things as efficient causes may occasion obstruction to commerce

and therefore are subject to prohibition by Congress as pointed out ante Part II. The facts established by this record demonstrate such obstruction as the direct result of defendants' actions.

II. Mr. Justice Holmes said:

> (404) Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business (although, in some cases, carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was, primarily, on the contractor's own account. * * * Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.
>
> Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized, or attempted to monopolize, some portion of the trade or commerce of the realm.

The minority were of opinion that merely uniting the interests of stockholders in the railroads through the Northern Securities Company, under the circumstances shown, was not within these definitions.

In the present case there are many contracts to refrain from competition which affected the contractor's own business, and repeated instances of efforts to drive out and deter competitors by unfair trade methods, and otherwise. The necessary tendency of defendants' operations is to monopoly, destruction of opportunity for strangers either to continue or enter in interstate or foreign commerce in tobacco and related commodities; and there is actual monopoly.

Harriman v. *Northern Securities Company* (1905), 197 U. S., 244—

This grew out of the Northern Securities case and was instituted upon the theory that absolute title to the railroad shares never passed, but was held by the company as trustee for the transferors and not in its own right. This court held the conveyances were completely executed and the company acquired absolute title. The decree in the Northern Securities case undertook to destroy the effect of these completely executed conveyances by preventing the use of property actually sold, transferred, and delivered. Speaking for a unanimous court, the Chief Justice said—

> For the purposes of that suit (Northern Securities case) it was enough that in any capacity the Securities Company had the power to

vote the railway shares, and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.

Some of our number thought that, as the Securities Company owned the stock, the relief sought could not be granted; but the conclusion was that the possession of the power, which, if exercised, would prevent competition brought the case within the statute, no matter what the tenure of title was.

Swift & Company v. *United States* (1905), 196 U. S., 375—

A proceeding against corporations, firms, and individuals in different States. The bill alleged that they were engaged in interstate commerce in the purchase, sale, transportation and delivery, and subsequent resale at the point of delivery, of cattle and fresh meats; that they combined to refrain from bidding against each other and to maintain uniform sale prices at which meat should be sold and uniform charges for deliveries; and that in these ways and others they restrained commerce in fresh meats from the purchase and shipment of the live stock to the final delivery to consumers. Upor appeal, this Court sustained a decree overruling the demurrer and approved the injunction (with some modifications) against all the parties (individuals included).

Mr. Justice Holmes, speaking for the Court, said—

(395) The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are, and from their nature must be, so extensive in time and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. * * *

(396) The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to *accomplish* it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may

make the parts unlawful. *Aikens* v. *Wisconsin*, 195 U. S., 194, 206. The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts. * * *

(397) Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State, is an object of attack. See *Leloup* v. *Port of Mobile*, 127 U. S., 640, 647; *Crutcher* v. *Kentucky*, 141 U. S., 47, 59; *Allen* v. *Pullman*

Co., 191 U. S., 171, 179, 180. Moreover, it is a direct object; it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States* v. *E. C. Knight Co.*, 156 U. S., 1, where the subject-matter of the combination was manufacture, and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales.

(398) It is said that this charge is too vague and that it does not set forth a case of commerce among the States. Taking up the latter objection first, commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble

> ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated. See *Norfolk & Western Ry.* v. *Sims*, 191 U. S., 441. But the sixth section of the bill charges an interference with such sales, a restraint of the parties by mutual contract, and a combination not to compete in order to monopolize. It is immaterial if the section also embraces domestic transactions.

Cincinnati et al., Packet Co. v. *Bay* (1906), 200 U. S., 179—

A suit on contract which defendants unsuccessfully urged was illegal because in violation of the Sherman Act. Speaking for the Court, Mr. Justice Holmes, among other things, said—

> (184) We will suppose, then, that the contract does not leave commerce among the States untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. * * * The chief and visible object of its provisions has nothing to do with commerce among the States. That which suspends payment of instalments in case of very serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will. * * *

(185) This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from any one, we believe that such a contract, made as part of the sale of a business, and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute.

Loewe v. *Lawlor* (1908), 208 U. S., 274—

This was heard upon demurrer to a declaration of parties who manufactured hats in Connecticut, and then sold and distributed them throughout many States, against members of the United Hatters of North America. It charged that defendants and other members of the association had combined for the purpose of forcing the plaintiffs against their will to employ them and that to bring this about they had by means of boycotts and otherwise interfered with operatives, intimidated customers, and prevented sale of manufactured goods. The defendants claimed the declaration stated no cause of action within the Sherman Act because the alleged restraint would operate entirely to destroy plaintiff's business and thereby include intrastate trade as well as interstate commerce; that physical obstruction was not alleged; and that they were not themselves engaged in interstate commerce.

The Chief Justice, speaking for the Court, declared the allegations of the petition sufficient. He reviewed former opinions and among other things said—

> (292) In our opinion, the combination described in the declaration is a combination "in restraint of trade or commerce among the several States," in the sense in which those words are used in the act, and the action can be maintained accordingly.
>
> (293) And that conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business. * * *
>
> (296) But the objection here is to the jurisdiction, because, even conceding that the declaration states a case good at common law, it is contended that it does not state one within the statute. Thus, it is said that the restraint alleged would operate to entirely destroy plaintiffs' business and thereby include intrastate trade as well; that physical obstruction is not alleged as contemplated; and that defendants are not themselves engaged in interstate trade.
>
> We think none of these objections are tenable, and that they are disposed of by previous decisions of this court.
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> *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S., 290; *United States* v. *Joint Traffic Asso.*, 171 U. S., 505; and *Northern Securities Co.* v. *United States*, 193 U. S., 197,

hold, in effect, that the antitrust law has a broader application than the prohibition of restraints of trade unlawful at common law. Thus, in the Trans-Missouri case it was said that, "assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration," and in the Northern Securities Case, that the act declares "illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States."

We do not pause to comment on cases such as *United States* v. *E. C. Knight Co.*, 156 U. S., 1; *Hopkins* v. *United States*, 171 U. S., 578; and *Anderson* v. *United States*, 171 U. S., 604, in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intention of the combination determined its legality. * * *

(300) The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other States, and that, for the direct purpose of destroying such interstate traffic, defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from reselling the hats which they had imported from

Connecticut, or from further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connecticut to the various places of destination. * * * If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and, at the other end, after the physical transportation ended, was immaterial.

Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that "every" contract, combination, or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed, so that the act remained as we have it before us.

See also—*National Cotton Oil Co.* v. *Texas*, 197 U. S., 115; *Shawnee Compress Co.* v. *Anderson*, 209 U. S., 423; *Continental Wall Paper Co.* v. *Voight*, 212 U. S., 227; *Granada Lumber Co.* v. *Miss.*, 217 U. S., 433.

VI.

Monopoly is the outcome of the practical cessation of effective business competition. This word in the antitrust act has no reference to a grant of special privileges, but is used in a broad sense. Trade and commerce in any commodity are monopolized whenever as the result of the concentration of competing businesses—not occurring as an incident to the orderly growth and development of one of them—one or a few corporations (or persons) acting in concert practically acquire power to control prices and smother competition.

To "monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade," etc., is declared unlawful by section 2 of the Sherman Act.

The rights of an individual acting alone are not involved in the present controversy, and it seems unnecessary to inquire concerning possible limitations on his liberty of action. Corporations are not hedged about by all the constitutional restrictions which apply to individuals; and are often themselves combinations subject to the rules of law applicable where the public interest is affected by the joint acts of many.

Manifestly the word "monopolize" has no reference to a governmental grant of exclusive privilege. Congress was striking at a well-known existing evil—unification of control in certain lines of commerce, with consequent destruction of competition, through powerful organizations—and the whole act must be construed and applied in view of its fundamental purpose as revealed by the history of the times and otherwise. The words "any part" in the second section are used with reference to the entire trade

or business in all commodities among the States. For example, the trade in iron pipe (*Addyston Pipe Co. case*), unset tiles (*Montague* v. *Lowry*), dressed meat (*Swift case*), and cigarettes, each constitutes a branch or "part of the trade or commerce among the several States."

The exact boundaries of monopoly are not easily fixed; and, as with fraud, a hard-and-fast definition is undesirable. A description of what comes clearly within the term is all the above proposition attempts. Generally, the essential thing is ability to control prices or deprive the public of advantages flowing from free competition. Whether this power has been actually exercised or prices increased or diminished is not decisive. If the power has been obtained through combinations destructive of competition and the circumstances indicate a dangerous probability of its exercise the arrangement clearly is within the statute. And possession of requisite ability must be determined by practical consideration of existing conditions, giving due weight to peculiarities of the commerce involved.

According to the letter of the statute, when commerce has been actually monopolized criminality does not depend on mental state of the parties, their primary or main intent or purpose, or methods used. How far these must be considered in peculiar cases—especially those involving the orderly expansion of strictly legitimate enterprises—we need not stop to consider; no such condition is presented here. Certain it is that where parties have deliberately pur-

sued a course, the ordinary result or necessary tendency of which is monopoly, they can not be heard to deny such an intent; and the plan is sufficient to give unlawful character to all their acts. *U. S.* v. *Trans-Mo. Ft. Assn.; Addyston Pipe Co.* v. *United States; Swift & Co.* v. *U. S.* Certainly, also, a monopoly is unlawful if acquired through contract, combination or conspiracy which directly and essentially destroys competition. And the monopolies and attempts to monopolize complained of and established are all within these plain principles. Because they may have been acquired in order to add to the wealth of defendants and not with a mere malicious purpose of wrecking others can not affect the situation.

This record occasions no necessity for discussing the proposition that 'Predominance, however extensive, in the manufacture and sale of a commodity established and maintained solely by superior skill does not constitute a monopoly.' (Brief, Mr. Cockran.) If the improbable case involving such a situation ever comes before the court it will then be time enough to consider the suggested problem. At this time it is moot. The monopolies attacked in the present proceeding have not been acquired solely by superior skill, but through a series of combinations themselves destructive of competition and unlawful. What lawfully may be done by one man or even by a corporation conducting its business along customary lines is not matter for present determination.

The courts have long referred to "monopoly," the outcome of individual action as distinguished from governmental grant, without exact definition; and they have habitually declared unlawful every arrangement directly leading to "monopoly." The word in the Sherman Act has the same significance as in the well known, often reviewed opinions, from *Mitchell* v. *Reynolds*, 1 P. Williams, 181, to *Continental Wall Paper Co.* v. *Voight*, 212 U. S., 227. In *U. S.* v. *Addyston Pipe Co.*, 85 Fed., 271, many of these are collected, classified and discussed.

E. C. Knight Co. v. *United States*, 156 U. S., 1, 16—

> Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.

In *People* v. *North River Sugar Refining Co.*, 54 Hun, 354, Barrett, *J.*, speaking of the results of combinations under consideration, said—

> (377) Of course a monopoly in the strict, technical, and absolute sense can not be thus created, but a monopoly in the legal sense can. The monopoly with which the law deals is not limited to the strict equivalent of royal grants or people's patents. Any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus at will enhance prices to the detriment of the public, is a legal monopoly.

See also *American Biscuit Co.* v. *Klotz*, 44 Fed., 721-724.

Pearsall v. *Great Northern Railway* (Mch., 1896), 161 U. S., 644—

It was proposed to turn over to the Great Northern Railway one-half of the stock of the Northern Pacific Road under an agreement between the two companies. This was successfully attacked because in violation of the statute of Minnesota prohibiting a railroad from acquiring control of a competing line. This court, speaking by Mr. Justice Brown, said—

> (671) With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured. * * *
>
> (676) Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect, in short, puts the public at the mercy of the corporation. There is and has been, for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We can not say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the

public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language. While, in particular cases, two railways by consolidating their interests under a single management, may have been able to so far reduce the expenses of administration as to give their customers the benefit of a lower tariff, the logical effect of all monopolies is an increase of price of the thing produced, whether it be merchandise or transportation. Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolies of all traffic along their lines; but the general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels against the attempt of one road to control all traffic between terminal points, also connected by a competing line. There are, moreover, thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth, which, though indirect, are even more insidious in their influence, and such as have awakened feelings of hostility which have not failed to find expression in legislative acts.

The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of

1874 and 1881 undoubtedly reflected the general sentiment of the public that, their best security is in competition.

National Cotton Oil Co. v. *Texas* (Feb., 1905), 197 U. S., 115—

The decree of the Texas court, declaring unlawful the action of cotton oil companies engaged in an effort to acquire a monopoly in commerce within that State, was upheld. Mr. Justice McKenna for the court said—

(129) It is certainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil. The foundations of the belief we are not called upon to discuss, nor does our purpose require us to distinguish between the kinds of combinations or the degrees of monopoly. It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a "condition produced by the acts of mere individuals." Its dominant thought now is, to quote another, "the notion of exclusiveness or unity;" in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be "unified tactics with regard to prices." It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to

> prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes; it has expression in the statutes of other States and in a well-known national enactment. According to them competition, not combination, should be the law of trade. If there is evil in this, it is accepted as less than that which may result from the unification of interests and the power such unification gives.

New York, N. H. & H. R. R. Co. v. *Interstate C. Com.*, 200 U. S., 361, 392.

In this cause the railroad claimed the right to contract for the sale of coal for future delivery at a fixed price and to comply by buying coal taken from mines along its line, transporting and delivering the same when the amount received therefor was not equal to the purchase price paid by the road, its published freight rates and other incident expenses. Speaking through Mr. Justice White, among other things, the court said:

> (392) That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose

> to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly.

Shawnee Compress Co. v. *Anderson*, 209 U. S., 423, 433—

A suit was brought in Oklahoma Territory by stockholders of Shawnee Company to cancel a lease of its property to the Gulf Compress Company. They alleged that the latter was in the business of leasing and operating competing compresses for the purpose of monopolizing as far as possible the business of compressing cotton in a large portion, if not all, the cotton-raising districts and that the lease in question was procured in pursuance of that scheme. The Supreme Court of the Territory declared: "Not only is the enterprise in which the Gulf Compress Company is engaged an unlawful one as now conducted, but the contract in question in this case being made to further its objects and purposes is void on the ground that it is in unreasonable restraint of trade and against public policy." And it accordingly sustained the bill. Upon appeal here the judgment was affirmed, and this court, by Mr. Justice McKenna, said:

> (433) It may be conceded that the evidence shows that the Shawnee Company was financially embarrassed, and its condition might have justified a lease of its property if that had been all it did. It, however, covenanted

for its assistance in discouraging competition against its tenant, and bound itself not to "directly or indirectly engage in the compressing of cotton within 50 miles of any plant operated by the tenant." So far it covenanted to aid in the restraint of trade. It went out of the field of competition. It covenanted not to enter into that field again, and it pledged itself to render every assistance to prevent others from entering it. And it could not misunderstand the purpose for which its lease was solicited. It was told by the president of the Gulf Compress Company. In a letter dated April 18, 1905, addressed to it by the president of that company, among other inducements, the following was expressed: "Our getting together on a lease proposed means the avoiding for each other, directly or indirectly, of the possibility, if not probability, of unnecessary competition." And what was the condition to which the Shawnee Company contributed? It appears from the letter just mentioned that the writer was president of two companies, which operated "forty-odd compresses." Twenty-seven of them, it appears from the testimony, were operated by the Gulf Company, six only of which it owned. Most of the latter were acquired in the summer preceding the lease, and the president of the Gulf Company testified that "We are prepared to buy or lease, whichever proposition suits us best." To what object was the assembling in one ownership or management so many compresses, and

keeping the means and declaring the purpose of acquiring more? The answer would seem to be obvious. The first effect would necessarily be the cessation of competition. If there was left a possibility of other compresses being constructed, it was made less by the power that could be opposed to them. The Gulf Company was a close corporation which, starting in Alabama, rapidly extended from Alabama to all the cotton-growing territory. These are some of the points of the testimony which, taken in connection with other testimony, and with the terms of the lease and the restriction upon the Shawnee Company, support the conclusions of the Supreme Court of the Territory. This case presents something more than the lease of property by the Shawnee Company, induced or made necessary by financial embarrassment. It presents something more than the acquisition by the Gulf Company of another compress—of a mere addition to its business. It presents acts in aid of a scheme of monopoly. *Swift & Co.* v. *United States*, 196 U. S., 375.

See also *U. S.* v. *Freight Ass'n*, 166 U. S., 290, 323; *Continental Wall Paper Co.* v. *Voight*, 212 U. S., 227; *American Biscuit Co.* v. *Klotz*, 44 Fed., 725; *Richardson* v. *Buhl*, 77 Mich., 632; *Pocahontas Coke Co.* v. *Powhatan C. & C. Co.*, 60 W. Va., 508; *Harding* v. *American Glucose Co.*, 182 Ill., 619–620; *Noyes on Intercorp. Rels.*, secs. 329 *et seq.*, 389; *Andrews Amer. Law* (2d ed.), Vol. I, 773.

VII.

The legislation against combinations and monopolies can not be defeated by causing a corporation to acquire the shares or the property and business of competing corporations; nor by any other scheme or device.

Congress has declared that interstate and foreign commerce shall not be materially restrained, obstructed, hindered, or interfered with by combinations or monopolies and has provided a remedy where one of these exists. The decisions of this court establish that the suppression or destruction of competition in its broad sense restrains trade. The language of the statute includes all combinations—whatever their form—which produce the mischief.

The earliest combinations destructive of competition were simple agreements among separate concerns. They were uniformly held in violation of public policy and consequently illegal. Seeking to avoid this result the well-known trust form was adopted. It likewise failed because in conflict with public policy and also the rules of corporation law. Lastly, the corporate form was hit upon; and it has been stoutly maintained that competition can be destroyed effectively and with impunity by causing a corporation to acquire the controlling shares or the business and property of competitors.

It may be that the corporate combination meets the requirements of corporation law; but manifestly it more effectively unifies control, destroys competition and occasions worse results to the public than either of the others. It conflicts with both public

policy and the letter of the statute, and consequently is illegal. *Eddy on Combinations*, Vol. I, sections 617–620 *et seq.*; *Noyes on Intercorporate Relations*, section 307; *Distillery Co.* v. *People*, 156 Ill., 448.

If A, B, and C, competitors, controlling the greater part of interstate commerce in a given commodity, enter into a thirty-day agreement by which they obligate themselves not to compete and assign to each certain territory, they unquestionably violate the law. But with strange regard for form and neglect of substance it often has been insisted that these same persons with the same design may organize a corporation, divide the shares amongst them, become its officers, create a practical monopoly by conveying to it with covenants against competition their several businesses to be thereafter conducted in unison, and in this way with certainty and impunity bring about the very situation which the Sherman Act was intended to prevent. The result indicates the groundlessness of the insistence.

If a corporate combination is beyond its reach, then Congress lacks supreme power to regulate commerce and its will is easily defeated. There is nothing peculiarly sacred about a corporation, which after all may be used as a mere form of combination. It is a creature of State law which certainly can not bestow power to defeat constitutional enactments not possessed by the State itself. *Northern Securities Case*, 193 U. S., 197; *Debs' Case*, 158 U. S., 564; *United States* v. *D. & H. R. R.*, 213 U. S., 366.

When necessary to promote the ends of justice and prevent wrong the courts may look through the mask of incorporation to the individuals behind it. A so-called charter which any individuals may obtain by going through a few forms prescribed by general statute is a "bundle of contracts;" and the members of such a corporation by joining it indicate an intent to "engage in a joint enterprise as an associated body." *Machen on Corporations*, sections 33, 34; *Baltimore & Potomac R. R.* v. *Fifth Baptist Church*, 108 U. S., 317, 330. There is a radical difference between the rights of individuals and corporations under the Constitution. And argument based on the assumption that the latter may do with impunity what may not be forbidden to the former often leads to conclusions wholly erroneous. *Hale* v. *Henkel*, 201 U. S., 43, 73, 75. This general doctrine was considered in the cases following: *Lehigh M. & Mfg. Co.* v. *Kelly*, 160 U. S., 327, 336, 337; *Miller & Lux, Inc.*, v. *East Side Canal, &c., Co.*, 211 U. S., 293; *So. Realty Investment Co.* v. *Walker*, 211 U. S., 603; *People* v. *North River Sug. R. Co.*, 121 N. Y., 582, 615; *State* v. *Standard Oil Co.*, 49 Ohio St., 137; *Distilling & Cattle Feeding Co.* v. *The People*, 156 Ill., 448, 490, 491; *Stockton, Atty. Genl.*, v. *C. R. Co.*, 50 N. J. Eq., 52.

The right to buy and sell is not superior to the right to make other contracts. All are subordinate to the power of Congress to regulate commerce, and any contract—however innocent if standing alone—may be criminal when part of a scheme to bring about unlawful ends. *Addyston Pipe Co.* v. *U. S.*, 175 U. S., 211;

Northern Securities Co. v. *U. S.*, 193 U. S., 197; *Swift & Co.* v. *U. S.*, 196 U. S., 396; *Shawnee Compress Co.* v. *Anderson*, 209 U. S., 423; *Armour Packing Co.* v. *U. S.*, 209 U. S., 56; *United States* v. *Del. & Hud. R. R.* (*Commodities Clause Case*), 213 U. S., 366; *Nat'l Harrow Co.* v. *Hench*, 83 Fed., 36; 84 Fed., 226.

The right freely to buy, sell, and transfer property is not a fundamental civil right, to be exercised without limitation as interested parties may determine. It is subordinate to public policy and the lawfully expressed will of Congress.

A corporation which—not as an incident to orderly growth—secures control of competitors by purchasing their shares, or property and business, and thereby acquires power to suppress competition, is no less inimical to public interests than a technical "Trust," and indeed is often a mere modification of it. *Distilling Co.* v. *People*, 156 Ill., 448–491. The trust form of combination is denounced in terms by the statute; and its successor is not less objectionable—indeed, in some ways is more harmful. The direct, necessary result of such an arrangement is to hinder and obstruct commerce. The *Pearsall* case, 161 U. S., 644; *Northern Securities* case, 193 U. S., 344; and *Shawnee Compress* case, 209 U. S., 423, seem conclusive on this point. *In re Green*, 52 Fed., 104, and the *E. C. Knight* case, if to the contrary, must be considered as disapproved.

The claim that the act of 1890 was directed against contracts and combinations of an executory nature

only, and was not intended to apply where transfers were actually executed before being attacked, is without foundation. It prohibits obstructions to commerce whether resulting from executory or executed arrangements; the effect on commerce is the important consideration. *Northern Securities Case*, 193 U. S., 197; *Shawnee Compress Co.* v. *Anderson*, 209 U. S., 423; *People* v. *Chicago Gas Trust*, 130 Ill., 268; *Distilling & Cattle Feeding Co.* v. *The People*, 156 Ill., 448; *Pocahontas Coke Co.* v. *Powhatan Coal & Coke Co.*, 60 W. Va., 508.

This general subject is vigorously discussed in *Eddy on Combinations*, secs. 617, 620 *et seq.*, and in *Noyes on Intercorporate Relations*, secs. 306, 319, 354; and the authorities are there collated and analyzed.

Eddy on Combinations, sec. 622—

> That which individuals can not lawfully do by simple combinations they can not lawfully do by corporate combinations. This proposition seems too clear to require illustration, and yet the impression prevails very generally that by simply changing the form of the combination the decisions against simple combinations and trusts have been entirely evaded. In so far as the decisions against trusts were based upon the general principles governing corporations, the adoption of the corporate form of combination undoubtedly meets many of the objections urged against the trust form; but in so far as the decisions against trusts and simple

combinations challenged the validity of combinations generally, the adoption of the corporate form is no evasion whatsoever. The right of any number of individuals to form a corporation and sell to the corporation, in return for either cash or the capital stock of the corporation, their plants and properties, has nothing to do with the question whether or not the object of these individuals in forming the combination and in so disposing of their plants and properties is to do that which is unlawful or oppressive.

Noyes on Intercorporate Relations, sec. 354—

The test of the legality of a combination lies in its object and not in its form. The view that a combination by means of a purchasing corporation is less vulnerable than other forms of combination is well founded only with reference to questions of corporation law. * * * That which public policy forbids in the case of an association or trust can not lawfully be done by a corporate combination, and *vice versa*. * * * If the sale is for the purpose of forming a corporate combination, in which the vendor corporation participates, the same rule of public policy is applicable as in the case of any combination of corporations. As already stated, the object of a combination, or the necessary or natural consequence of its operation, determines its legality. The form—trust, corporate combination or association—will not serve as a cloak for conspiracy nor prevent the application of the rule of public policy.

Corporate power to purchase no more authorizes the exercise of such power for purposes opposed to public policy than a general power to make contracts authorizes the execution of agreements conflicting with the public interests.

See Id. secs. 386 *et seq.* on interpretation of Sherman Act.

VIII.

A foreign corporation doing business within the United States has no right to violate their policy or laws. An agreement or combination which in purpose or effect conflicts therewith, although actually made in a foreign country where not unlawful, gives no immunity to parties acting here in pursuance of it.

The contracts between the Imperial and the American companies under which they organized the British-American Company and apportioned the world, were executed in England and defendants claim were lawful there. All the parties operate here in pursuance of them.

The doctrine stated above seems obvious. If the Government is powerless to prevent wrongs within its own jurisdiction when the actors are foreigners or when done in pursuance of agreements made abroad, then its supposed sovereignty is a myth.

Section 8 of the Sherman Act in specific terms makes it applicable to "corporations and associations existing under or authorized by * * * the laws of any foreign country."

There is no proper evidence in the record to prove the law of England. "Foreign laws are well understood to be facts which must like other facts be proved to exist before they can be received in a court of justice." *Church* v. *Hubert*, 2 Cranch, 187–237; *Armstrong* v. *Lear*, 8 Peters, 52, 72; *Lloyd* v. *Matthews*, 155 U. S., 222; *Cuba R. Co.* v. *Crosby*, 170 Fed., 369.

The rule that the courts of one country can not take cognizance of the law of another, without plea and proof, has been constantly maintained at law and in equity in England and America. *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S., 397, 445.

Wharton on Criminal Law—

> (Sec. 278) Cases can easily be conceived in which a person, whose residence is outside a territory, may make himself, by conspiring extra-territorially to defeat its laws, intra-territorially responsible. If a forger, for instance, should establish on the Mexican side of the boundary between the United States and Mexico a manufactory for the forgery of United States securities, for us to hold that when the mischief is done he would not be liable to arrest on extradition process, and that he could afterwards take up with impunity his residence in the United States, would not merely expose us to spoliation, but bring our Government into contempt.
>
> (Sec. 279) A party who in one jurisdiction puts in operation a force which does harm in

another jurisdiction, is responsible in both jurisdictions for the harm.

(Sec. 287) In conspiracies, by the common law, each conspirator is responsible in any place where any overt act by any of his co-conspirators is done, as well in the place where the crime is concocted and started.

A crime is committed within the jurisdiction where the act of the parties actually takes effect, although the instrumentalities may have been set in motion within another jurisdiction. *Re Palliser*, 136 U. S., 256, 265; *Horner* v. *United States*, 143 U. S., 207; *Benson* v. *Henkel*, 198 U. S., 1; *Burton* v. *United States*, 202 U. S., 344, 387; *United States* v. *Thayer*, 209 U. S., 39, 44.

Contracts permissible by other countries are not enforcible in our courts if they contravene our laws, our morality, or our policy. *Oscanyan* v. *Winchester, &c., Co.*, 103 U. S., 261; *Kennett* v. *Chambers*, 14 How., 38; *Walworth* v. *Harris*, 129 U. S., 355; *Pollock on Contracts*, side pgs., 387, 388; *Page on Contracts*, Vol. III, Sec. 1729; *Westlake on Private International Law*, 3rd Ed., 259, 260.

Generally speaking, the validity of a contract depends upon the law of the place where it is made unless it is to be performed in another country; in the latter case, the law of the place of performance governs. Story on Conflict of Laws, Secs. 242, 244.

The rule of comity does not require any nation to allow a foreign corporation to engage in business with-

in its jurisdiction in a manner violative of express statute or contrary to its policy. *Bank of Augusta* v. *Earle*, 13 Pet., 519, 589; *London, Paris & Amer. Bank* v. *Aronstein*, 117 Fed., 601; *Williams* v. *Gold Hill Min. Co.*, 96 Fed., 464.

A foreign corporation doing business in this country is amenable to our laws and it can not escape the consequences of an illegal act by setting up a foreign charter. *Orient Ins. Co.* v. *Daggs*, 172 U. S., 557; *Hammond Packing Co.* v. *Arkansas*, 212 U. S., 322; *Horn Silver Min. Co.* v. *N. Y.*, 143 U. S., 305; *Lafayette Ins. Co.* v. *French*, 18 How., 404; *State* v. *Phipps*, 50 Kan., 609; *Harding* v. *Am. Glucose Co.*, 182 Ill., 551; *Dayton, &c., Co.* v. *Barton*, 103 Tenn., 604; *State* v. *Stand. Oil Co.*, 61 Neb., 28; *People* v. *Cent. R. R. of N. J.*, 48 Barb., 478; *Warren Mfg. Co.* v. *Aetna Ins. Co.*, 2 Paine, 501. See also *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S., 28; *State, ex rel. Astor* v. *Schlitz Brewing Co.*, 104 Tenn., 715.

It is wholly immaterial that a combination affecting our commerce was formed in a foreign country if operations under it are conducted here. *Thomsen* v. *Union Castle Mail Steamship Co.*, 166 Fed., 253.

American Banana Co. v. *United Fruit Co.*, 213 U. S., is in no way inconsistent with this insistence.

IX.

The courts should enforce the antitrust legislation by all appropriate processes known to their usages; and decrees should be so molded as to suppress effectually the mischief consequent upon unlawful arrangements.

In *Northern Securities Company* v. *United States*, 193 U. S., 197, this court said:

> (346) In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States.
>
> * * * * *
>
> (360) This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act" (section 4); and the court, in virtue of a well-established rule governing proceedings in equity, may mold its decree so as to accomplish practical results—such results as law and justice demand.

By constitutional enactment Congress has forbidden monopolies and combinations. When one exists everything done to further its purpose is unlawful, especially every act constituting a part of interstate or foreign commerce. Therefore the privilege of engaging therein may be denied. The power to regulate extends to prohibition of anything directly conflicting with the will of Congress lawfully expressed. *Champion* v. *Ames* (*Lottery case*), 188 U. S., 321; *United States* v. *D. & H. Co.*, 213 U. S., 366; *Loewe* v. *Lawlor*, 208 U. S., 274.

The statute requires the court "to prevent and restrain violations"—not merely to pass upon the legality of past transactions. After the purposes of a combination or attempt to monopolize have become effective it would be idle ceremony merely to inveigh against the means by which the end was accomplished or to enjoin the use of methods successful in the past but no longer necessary.

The public interest demands destruction of existing mischief and prevention of threatened wrong. This can not be accomplished by simply enjoining methods which have brought about an unlawful status. The courts should destroy the foundation of the existing unlawful power.

It has been contended that the Sherman Act strikes executory contracts but has no application to those actually executed. In other words, to attempt is penal; but success gives complete immunity! Counsel below argued that while attempts to monopolize might be prohibited, an *existing*, accomplished monopoly is not within the statute; "that Congress did not intend to prohibit a state of being, but it intended to prohibit certain activities the tendency of which is to exclude others from the trade!" If one's house were being looted he would find small comfort in an injunction (however fierce its terms) which merely restrained the robbers from thereafter using the ladder which let them in. Direct, vigorous blows against vital points are imperative when dealing with powerful, determined lawbreakers.

In simple combinations where the identity of each party has been preserved a decree forbidding action in pursuance of the unlawful project may suffice. When there is a trust or a holding corporation a decree forbidding the exercise of dominion over the stock may suffice. Where the combination is in the corporate form and the identity of original elements (independent businesses) has been destroyed, each having been swallowed up, and also where one corporation has acquired a monopoly by a series of combinations or purchases or otherwise, more difficult problems are presented. It is nevertheless the court's duty to prevent public injury and wrongdoers may not complain if an illegal structure is wholly annihilated. The public welfare is the prime consideration.

We submit that where an unlawful corporate combination exists and identity of constituents has been destroyed, or where one corporation has acquired a forbidden monopoly, there are two possible effective remedies. The first is to enjoin the corporation from doing interstate or foreign business until (if ever) it can affirmatively show that its affairs have been so readjusted as to render future operations lawful. The second is a receiver to take possession of the concern and by proper action restore the opportunities for free competition unlawfully smothered or destroyed. How this can be done will, of course, depend on the special facts of each case. Whenever the first remedy suggested would unreasonably inconvenience the public by immediately destroying sources of

supply, the second may be adopted. The purpose of removing any obstruction to commerce is to benefit the public, and that should always be a prime consideration.

In *Deb's* case, 158 U. S., 564, without mandate of statute, the court granted a sweeping injunction against a mob interfering with the free flow of commerce. May not the court, obeying a positive command to "restrain and prevent" combinations and monopolies, issue an injunction forbidding any ascertained combination or monopoly to operate in interstate or foreign commerce; or, for the especial protection of public interests, appoint receivers and require them to take steps necessary to restore conditions harmonizing with the statute?

A court of equity has full power to shape its decrees so as to enforce the law; *Taylor* v. *Simon*, 4 Mylne & Craig, 141; Pomeroy on Eq. Juris., 2d Ed., Secs. 111–170.

In *Chicago, Rock Island, &c., Ry.* v. *Union Pacific Ry.*, 47 Fed., 15–26, Mr. Justice Brewer, then circuit judge, replying to an argument that there was no precedent for the decree prayed, said—

> I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand. * * * the powers and processes of a court of equity are equal to any and every emergency.

> They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature and do justice to every individual.

In *Stockton, Atty.-Gen.*, v. *Central R. R. Co.*, 50 N. J. Eq., 52, 489, the State sought to prevent a combination to control the market and enhance the price of anthracite coal, and the Chancery Court granted an injunction. Subsequently, the Attorney-General (50 N. J. Eq., 489) reported that the decree was ineffectual and was being disobeyed; and he asked "that a receiver be appointed to take charge of the road of the Central Railroad Company of New Jersey generally, or with such powers in relation to the transportation of coal thereover as may be necessary to enforce obedience to the commands of such order and injunction." Concerning the proposed receivership, the Court said—

> (499) I have not for a moment doubted the power of this court, where it is necessary to prevent the property of the defendant from use in the contrivance of devices to mislead and deceive the court and thereby defeat its injunction, to take control of that property through the instrumentality of a receiver. Indeed, the power of the court to appoint such a receiver, when the appointment is necessary to effectuate its decree, has not been disputed.

Such power is so essential at times to the efficient exercise of the court's jurisdiction that it has become too well established either to be seriously questioned or to need citation of authority to support it. Out of consideration for property rights it is sparingly and cautiously exercised, but when execution of a decree depends upon its exercise the court will most certainly use it to the full extent that the exigencies of the case demands.

See also *McCarter, Atty.-Genl.*, v. *Firemans Ins. Co.*, 73 Atl. Rep., 80,; —N. J.,—(July 8, 1909).

X.

Summary of the petition—History and facts not in controversy.

The story of The American Tobacco Company and its allied corporations is long and complicated. The petition, based chiefly upon information obtained from defendants, was intended to set out pertinent facts with sufficient completeness for pleading; and also for a fair understanding of existing conditions, how they were brought about, and the purpose of the parties. Answers in general terms and lengthy written admissions were put in. Improper methods, evil intent, and unlawful restraint or monopoly are all stoutly denied; but in general there is no material controversy over the statements in the petition concerning former trade methods, the origin, development, and extension of The American Tobacco Company and its allies, their relations and contracts with each other, and the amount and character of their business.

In order, therefore, to point out the essential facts as briefly as clearness will permit there follows a full outline of the petition's contents, to which are added in their proper connection some undisputed things (with citations to record), usually indicated by brackets. This will be succeeded by statements of points in the answers and concerning evidence relating especially to contraverted subjects.

THE DEFENDANTS AND GENERAL ALLEGATIONS.

Defendants are sixty-five corporations—most of New Jersey, two of Great Britain—and twenty-nine officers, directors, and agents. [For corporate relationship see Gov. Ex. 87, R. V.] The principal ones are The American Tobacco Company, capital $118,931,500; Imperial Tobacco Company of Great Britain and Ireland, capital 18,000,000 pounds sterling; Havana Tobacco Company, capital $35,000,000; American Snuff Company, capital $25,000,000; American Cigar Company, capital $20,000,000; American Stogie Company, capital $11,855,000; MacAndrews & Forbes Company, capital $7,000,000, and United Cigar Stores Company, capital $1,650,000. All are charged with being parties to contracts, agreements, combinations, and conspiracies in restraint of interstate and foreign commerce in tobacco leaf and products and related articles, and with monopolizing and attempting to monopolize the same.

DESCRIPTION OF TOBACCO BUSINESS (Par. II, R. I, 12).

The chief use of leaf tobacco is for making cigars, cigarettes, snuff, and preparations for smoking or chewing (plug). The average annual crop in the United States amounts to about 800,000,000 pounds, is composed of distinct types—with sundry grades—which grow in widely separated sections; and each is essential for some special product or brand—no other can be substituted. The types, with the States where grown, their approximate amounts, proportions purchased by defendants (from 20 to 90 per cent), and also the quantity exported (300,000,000 pounds annually), with its ultimate destination are stated (R. I, 13–14). [See evidence defendants' purchasing agent Yuille, R. II, 95–99.]

Before 1890, along customary lines, many separate independent concerns grew up and were successfully engaged in buying, manufacturing, selling, and distributing tobacco in various States and abroad. They purchased leaf where it grew, caused its transportation to their plants, manufactured the products and then sold, shipped, and distributed these throughout this country and others. All as active competitors were engaged in interstate and foreign commerce and each sought to extend its trade in the ordinary ways. Many buyers representing independent dealers, speculators, warehousemen, and manufacturers, located in various States, sought to purchase leaf directly from the farmer or at central markets; and effective competition determined prices. Related ar-

ticles were likewise manufactured, bought, and sold (R. I, 15–16). [See evidence of Kinney, R. II, 530; Yuille, R. II, 89; R. K. Smith, R. II, 156; Cobb, R. III, 8.]

Within recent years it became customary to pack tobacco products in small parcels ready for the consumer, marked with distinctive names or brands, and to advertise and otherwise popularize them. [For such advertisements see Exs. 68 & 69, R. V, 507.] As a result, the business became largely a "matter of brands" and the leading ones highly important to jobbers and retailers.

Commerce in tobacco leaf and products grew along the lines indicated and but for the unlawful action of defendants would have so continued.

ORGANIZATION OF THE AMERICAN TOBACCO COMPANY—CIGARETTE MONOPOLY (Par. III, R. I, 16).

Before January, 1890, five distinct concerns—Allen & Ginter, W. Duke, Sons & Co., Kinney Tobacco Company, W. S. Kimball & Company, Goodwin & Company—located in North Carolina, Virginia, and New York—manufactured, sold, and distributed here and abroad 95 per cent of all domestic cigarettes, and a considerable quantity of smoking tobacco [Ex. 9, R. V, 32]. They were independent and in unrestrained effective competition as purchasers of leaf and as manufacturers, sellers, shippers, and distributors of tobacco products. Their owners, believing this would yield larger profits, determined to combine through a corporation and use it to destroy com-

petition and monopolize commerce in cigarettes. In January, 1890, having agreed upon a capital stock of $25,000,000 (afterwards $35,000,000 and $70,000,000), all to be divided amongst them [for details see Ex. 8, R. V, 3–4], and who should be directors, they organized The American Tobacco Company in New Jersey [Charter, R. V, 34], "for trading and manufacturing," with broad powers, and conveyed to it at greatly inflated valuations the assets and businesses, including good-will and right to use the names of the old concerns; and thereafter this corporation carried on the business of all, competition amongst them was destroyed and commerce in cigarettes monopolized. [The fair value of the tangible assets of all five was $3,545,108.02, according to report of Bureau of Corporations to the Senate, June 5, 1909.]

The American Tobacco Company was originally and with added acquisitions has continued to be a combination in restraint of interstate and foreign commerce and has always had a monopoly. In 1890 it required under 15,000,000 pounds of leaf and manufactured 5,526,000 pounds of smoking products and 2,410,520,000 cigarettes—the latter being 96 per cent of the total domestic output [Ex. 8, R. V, 4].

DEFENDANTS, PURPOSE AND GENERAL METHODS (Par. IV, R. I, 19).

About 1891, and subsequently, The American Tobacco Company, its officers, directors, and others, entered into and have remained parties to contracts, combinations, and conspiracies in restraint of inter-

state and international commerce in tobacco and related commodities, and ever since have monopolized and attempted to monopolize the same. These have been continuously acted upon with the purpose and effect of destroying competition, unreasonably hindering and obstructing commerce, and causing others to retire therefrom or not to enter. The American Tobacco Company has been the principal instrument for carrying out the defendants' purpose, but they have from time to time adopted any expedient means. Among other things they have done and are doing those hereafter specifically detailed.

With expanding purpose to dominate the industry, defendants have progressively absorbed competitors or driven them out by oppressively attacking and threatening to attack with ferocious opposition and unfair trade methods; and by the exercise of their great power have deterred and prevented others from engaging in the business.

Through offers of large sums of money, accompanied by threats of irresistible competition, they have compelled other concerns to sell out, taking from their directors and stockholders agreements against competition; by agreements and combinations with others, managers, etc., and by issuing in exchange stock or otherwise, they have acquired dominion over competitors; they have caused the organization of corporations with wide powers, which they control, and through these acquired the business of others; and by unlawful contracts with opponents

they have apportioned the trade and commerce in tobacco throughout the world. They have concealed their relationship with controlled companies and used them, acting under the guise of independents, to break down opposition; they have acquired monopolies of articles necessary in manufacturing tobacco products, such as licorice, tin-foil, etc.; they have practiced unfair trade methods, sold their goods below cost, manipulated the markets, and otherwise exercised their great power to gain control and destroy opponents; and they have obtained dominion over the agencies through which tobacco and its products are bought and sold, through outright ownership, by advancing large sums of money, giving unusual credits, by threats to withdraw their goods or patronage, etc.

EXPANSION OF BUSINESS AND ACQUISITION OF COMPETITORS BY THE AMERICAN TOBACCO COMPANY (Pars. V, VI, R. I, 22–29).

(After the foregoing recitals the petition proceeds to set forth with particularity how the general purpose has been carried out and results accomplished.)

From 1891 to 1898 The American Tobacco Company acquired (frequently by issuing stock) property, plants, business, good-will, etc., of many important competing concerns (they are enumerated R. I, 22–29) located in different States and engaged in commerce as purchasers, manufacturers, sellers, and distributers of tobacco leaf and its products, taking from the owners, stockholders, and others stipulations

not to engage in such business for periods varying from ten to twenty years (see Ex. 31, R. V, 114). These plants were sometimes run as branches, but generally closed. During the year 1891 the manufactured output of the company was [cigarettes and little cigars (No.) 2,798,946,500; smoking (lbs.) 10,371,877; fine cut (lbs.) 262,114; snuff (lbs.) 311,750; plug (lbs.) 4,342,790; Exs. 77, 78, 79, 80, 82, R. V].

CONTINENTAL TOBACCO COMPANY—PLUG COMBINATION (Par. VII, R. I, 29–34).

When the American Tobacco Company entered the plug trade it came into active competition with other powerful concerns likewise engaged; and in 1893 it endeavored to bring about a combination. [See Ex. 39, R. V, 192.] This failed and a fierce commercial warfare followed, continuing until 1898 with heavy loss to the company. [In 1895, $892,687; 1896, $1,378,345; 1897, $889,730; 1898, $926,302. See Rept. Bureau of Corporations on Prices of Tobacco, June 5, 1909, p. 35. For details concerning growth of this business see Ex. 79, R. V; and for action of directors concerning losses see Ex. 39, R. V, 192, 193.]

In 1898, after continued negotiations, The American Tobacco Company and certain leading plug competitors agreed to unite through the Continental Tobacco Company to be organized in New Jersey for "trading and manufacturing," with capital of $75,000,000 (afterwards $100,000,000), which should

apportion its stock amongst them and take over the business and property of all (R. I, 29–34). [Charter Ex. 12, R. V, 39.] Immediately after organization this company issued stock, as agreed, and took transfers of plants, assets, and business of five large and successful competing plug manufacturers (R. I, 32); the American Company also conveyed at greatly inflated valuations, the assets, brands, real estate, and good-will appertaining to its plug business; and the principal owners and managers of the old concerns agreed not thereafter to engage in the business. Likewise, under the preliminary arrangement, the Continental Company acquired the common stock of P. Lorillard Company, a large producer of tobacco products, taking similar covenants (R. I, 32). The American Company became owner of $30,000,000 stock in the Continental and remained the dominant stockholder; James B. Duke was president of both, and their affairs were conducted in concert. Having acquired these plants, assets, and competing businesses the Continental Company conducted them all and competition was destroyed.

The separate organization of P. Lorillard Company has been preserved—many individuals holding its preferred stock—but it has been controlled by the Continental or American and all competition prevented (R. I, 32, 33).

ACQUISITION OF SUNDRY COMPETITORS BY AMERICAN AND CONTINENTAL COMPANIES IN 1899, AND SUBSEQUENTLY (Pars. VIII and IX, R. I, 34–47).

In 1899, and thereafter, The American and Continental companies for cash or stock, at an aggregate cost exceeding $50,000,000, took over and closed up some thirty competing corporations and partnerships (specified in Petition, Par. VIII, R. I, 34–38) theretofore engaged in interstate and foreign commerce as manufacturers, sellers, and distributers of tobacco and related commodities, the interested parties covenanting not to engage in the business; and in this way destroyed competition and increased their power.

Likewise they acquired for cash, by issuing stock, and otherwise, control of many competing corporations now going (specified in Petition, Par. IX, R. I, 39–47), with plants in various States, Cuba and Porto Rico, which manufacture, buy, sell, and distribute tobacco products or related articles throughout the United States and abroad as a part of commerce; and took from the parties in interest the usual covenants. [For examples of methods see Exs. 32 and 33, R. V, 132 *et seq.*] These have been operated in pursuance of the general plan and have acquired subsidiaries. Some of those so acquired (others are described later) are the following—

MONOPOL TOBACCO WORKS (NEW YORK, N. Y.).—Capital $40,000—cigarettes and smoking tobacco. In 1899 The American Tobacco Company acquired all the shares for $250,000, and it is now a selling agency.

LUHRMAN & WILBERN TOBACCO COMPANY (MIDDLETOWN, OHIO)—Capital $900,000—scrap tobacco. This business was formerly carried on by a partnership. For the purpose of taking it over in 1899, The American Company caused the Luhrman & Wilbern Tobacco Company to be incorporated in New Jersey [Ex. 32, R. V, 132.] The connection was long concealed and denied. [Its output for 1907 was 12,958,963 pounds of smoking tobacco.—Ex. 78, R. V.]

MENGEL BOX COMPANY (LOUISVILLE, KY.)—Capital $2,000,000—boxes for packing tobacco. In 1899 Continental Company acquired control of the partnership (C. C. Mengel, Jr., Bro. & Co.) and by agreement organized in New Jersey the Mengel Box Company, which took over the old business and assets. This company has acquired the stock ($150,000) of Columbia Box Company and of Tyler Box Company ($25,000), both at St. Louis, and dominates the business.

THE PORTO RICAN-AMERICAN TOBACCO COMPANY (PORTO RICO)—Capital $1,799,600. In 1899 The American Company caused the organization of the Porto Rican-American Tobacco Company, which took over the partnership business of Rucabado y Portela—manufacturer of cigars and cigarettes—with covenants not to compete. The American Tobacco Company and American Cigar Company each hold $585,300 of the stock; the balance is in the hands of individuals. [Ex. 8, R. V, 9]—[Its output for 1907 was

321,657,040 cigarettes, 54,327,144 cigars, and 13,775 pounds of plug; it dominates the tobacco business in that island.—Ex. 85, R. V.]

KENTUCKY TOBACCO PRODUCT COMPANY (LOUISVILLE, KY.)—Capital $1,000,000. In 1899 the Continental Company acquired control of the Louisville Spirit-Cured Tobacco Company, engaged in curing and treating tobacco and utilizing the stems for fertilizers. By agreement, the Kentucky Tobacco Product Company was organized in New Jersey, with $1,000,000 capital, $450,000 issued to the old stockholders, and $550,000 to Continental Company as consideration for agreement to supply stems. The company has acquired a practical monopoly in this line.

GOLDEN BELT MANUFACTURING COMPANY (NORTH CAROLINA)—Capital, $700,000—cotton bags and containers. In 1899 The American Tobacco Company acquired the business of this corporation, which was formed to take over a going business. It has contracts to supply members of the combination and is rapidly acquiring a monopoly.

THE CONLEY FOIL COMPANY (NEW YORK)—TINFOIL COMBINATION—Capital, $825,000. In December, 1899, The American Tobacco Company secured control of the business of John Conley & Son (Partnership), New York, N. Y., manufacturers of tinfoil, an essential for packing tobacco products. By agreement the Conley Foil Company was incorporated in New

Jersey "for trading and manufacturing," etc., with $250,000 capital (afterwards $375,000 and $825,000)—[see Charter, Ex. 18, R. V, 69], which took over the firm's business and assets, etc., and The American Tobacco Company became owner of the majority shares. The Conley Foil Company has acquired all stock of Johnston Tinfoil & Metal Company, of St. Louis, a leading competitor, and they supply under fixed contracts, at remunerative prices, the tinfoil used by defendants [the major part of the total production in the United States], leaving the excess, whenever expedient, to be sold below cost to destroy competitors and strengthen its monopoly.

R. J. Reynolds Tobacco Company (Winston-Salem, North Carolina)—Capital, $7,525,000. In 1899 the Continental Tobacco Company acquired control of the R. J. Reynolds Tobacco Company, one of the largest manufacturers of plug—output in 1898, 6,000,000 pounds. By agreement, a new corporation (with same name) was organized in New Jersey and capitalized at $5,000,000 (afterwards $7,525,000), which took over the business and assets of the old one. [See Charter, Ex. 19, R. V, 72.] The Continental Company immediately acquired the majority shares and The American Company now holds $5,000,000 of stock. The separate organization has been preserved, but its business conducted without competition. In 1906 it purchased 27,500,000 pounds of leaf. [In 1907 its output was 1,255,988 pounds of smoking tobacco and 21,616,781 pounds of plug—Exs. 78 and 79,

R. V.] Acting under direction, the R. J. Reynolds Tobacco Company has purchased the business and assets and majority shares of other concerns (specified in Pet., R. I, 44), with covenants against competition.

BLACKWELL'S DURHAM TOBACCO COMPANY (DURHAM, N. C.)—Capital $1,000,000. In 1899 The American Tobacco Company procured for $4,000,000 all the stock of Blackwell's Durham Tobacco Company at Durham, N. C., manufacturer and distributor of tobacco products. Thereupon the Blackwell's Durham Tobacco Company, of New Jersey, capital $1,000,000, all owned by the American, was organized and took over the assets of the old company, then under receivership. Its separate organization has been preserved. [In 1907 its output was 15,365,184 pounds of smoking tobacco—Ex. 78, R. V.]

Acting under direction, the Durham Company has acquired control of the following competitors—Reynolds Tobacco Company; F. R. Penn Tobacco Company [Exs. 37 and 38, R. V, 182, 186]; and Wells-Whitehead Tobacco Company.

AMERICAN SNUFF COMPANY—SNUFF COMBINATION (Par. X, R. I, 47).

Prior to 1900, the Continental Tobacco Company, The American Tobacco Company, and P. Lorillard Company manufactured, sold, and distributed snuff throughout the various States—their combined output in 1899 approximating 5,000,000 pounds (R. I, 47). Between these and the Atlantic Snuff Company, itself a combination of competitors—producing

5,000,000 pounds annually—the George W. Helme Company, Weyman & Brother, and others, there was sharp competition. To destroy this and obtain monopoly, defendants, in March, 1900, organized in New Jersey the American Snuff Company, capital $25,000,000, to take over the plants, business, assets, etc., of the competitors. [See Charter, Ex. 16, R. V, 57.] This company by issuing stock acquired the business and assets of Atlantic Snuff Company and the snuff business of P. Lorillard Company, Continental Tobacco Company, George W. Helme Company, and The American Tobacco Company, taking the usual covenants not to compete, and thereafter conducted the business of all. [See Preliminary Agreement, Ex. 34, R. V, 148.]

Pursuing the general plan the Snuff Company has acquired control of plants, business, and assets of all important competitors (Specified in Pet., R. I., 47–57) either by outright purchase or through stock ownership—with the usual covenants—and controls more than 95 per cent of the business. It has often used unfair and oppressive methods [see Ex. 41, R. V, 307], and has secretly operated the Standard Snuff Company, of Nashville, Tenn.

The American and Continental companies have always controlled the Snuff Company; their affairs have been conducted in concert; enormous profits have accrued; and interstate commerce in snuff has been monopolized. [The output of defendant for 1907 was 22,067,234 pounds—total for United States 22,960,038—See Ex. 82, R. V.]

SUNDRY GOING COMPANIES CONTROLLED BY THE AMERICAN TOBACCO COMPANY THROUGH STOCK OWNERSHIP—UNITED CIGAR STORES COMPANY—THE LICORICE COMBINATION (MAC ANDREWS & FORBES)—RICHARDSON & COMPANY—AMSTERDAM SUPPLY COMPANY, ETC. (Par. XI, R. I, 57–74.)

S. ANARGYROS—Capital $650,000—Turkish cigarettes. In 1890 The American Tobacco Company procured the organization of corporation S. Anargyros, which took over that individual's going business and has since controlled it. [Through this company the business in Turkish cigarettes is largely conducted. In 1907 its output was 554,492,480—Ex. 77, R. V.]

THE JOHN BOLLMAN COMPANY (SAN FRANCISCO)—Capital $200,000—cigarettes. In 1900 The American Tobacco Company procured organization of The John Bollman Company, which took over the business of the former concern in exchange for stock. Its separate organization has been preserved but no competition exists. [Its output for 1907 was 43,688,300 cigarettes—Ex. 77, R. V.]

UNITED CIGAR STORES COMPANY—RETAIL BRANCH OF COMBINATION.

In November, 1901, The American Tobacco Company acquired stock control of and has since directed and financed the United Cigar Stores Company (of New Jersey), organized in May, 1901 [original paid-up capital $2,500], to sell and distribute tobacco products throughout the United States, especially at retail. The stock was rapidly

increased. The American Tobacco Company now holds $600,000 of the $900,000 common, all preferred—$750,000, and $2,850,000 bonds. The United Company has acquired the business of many retailers and procured and forced their retirement. It buys tobacco products and supplies of all kinds in the different States, ships them to its depots in New York City, Chicago, and San Francisco, and then distributes them among its various stores. It operates retail cigar stores in New Jersey, New York, Pennsylvania, Ohio, Maryland, District of Columbia, Connecticut, California, Washington, Delaware, Oregon, Texas, Massachusetts, Rhode Island, Illinois, Minnesota, Michigan, Indiana, Missouri, Wisconsin, Kentucky, and other States. It promotes and furthers the sale of defendants' products and hinders and obstructs the sale of independent goods, either refusing to handle them or accord fair treatment. For a long time the association with defendants was concealed and denied. It has been and is used as an instrument to control the retail business and cripple competitors; it has bought out dealers, taking the usual covenants from the vendors. It has likewise at tremendous cost set up retail stores at prominent places in various cities and with the powerful support of defendants is seeking to dominate the retail trade. Through stock ownership it controls the following companies engaged in the tobacco trade (R. I, 59–60): United Cigar Stores Company, Chicago, Ill., capital $389,800; United Cigar Stores Company, Providence, R. I., capital $98,000; The Royal Com-

pany, New York City, capital $100,000; C. A. Whelan & Co. (Inc.), Syracuse, N. Y., capital $50,000; United Cigar Stores Company, agency, New York, capital $1,000; United Merchants Realty and Improvement Company, of Rhode Island, capital $500,000; Moebs Cigar Stores Company, Detroit, Mich., capital $10,000; Wm. Baeder & Company, New York, capital $25,000.

F. F. ADAMS TOBACCO COMPANY (MILWAUKEE, WIS.).—Capital $400,000—Manufacturers and distributers of tobacco. In 1902 the Continental Company acquired for $2,205,090 the entire capital, with the usual covenants. Its separate organization has been preserved, but under agreement no competition exists. [In 1907 its output was 4,794,129 pounds of smoking tobacco and 168,433 of "fine cut."—Exs. 78 and 80, R. V.]

SPAULDING & MERRICK (CHICAGO, ILL.).—Capital $100,000—Manufacturers and distributers of tobacco. In 1902 the Continental Company for $1,362,900 acquired control, and thereupon organized a new corporation with the same name in New Jersey, which took over the business and assets of the going concern, with the usual covenants. [Its output for 1907 was 7,396,153 pounds of smoking tobacco and 5,455,260 of "fine cut."—Exs. 78 and 80, R. V.]

MACANDREWS & FORBES COMPANY — LICORICE COMBINATION.—Capital $7,000,000. Licorice paste, an essential in plug tobacco, is made from an oriental root. Prior to 1902 many competing concerns

imported this root, manufactured products therefrom, and sold and distributed them in the usual ways. The principal ones were MacAndrews & Forbes, Newark, N. J.; The Mellor & Rittenhouse Company (controlled by Continental Company), Camden, N. J.; J. S. Young Company, Baltimore, Md.; Stamford Manufacturing Company, Stamford, Conn.; and John L. Lewis, Providence, R. I. Smaller manufacturers were Young & Smylie, F. B. & V. P. Scudder, and Weaver & Sterry, Limited, New York City.

In May, 1902, the Continental Company secured control of MacAndrews & Forbes and contracted with The Mellor & Rittenhouse Company and MacAndrews & Forbes [see Ex. 23, R. V, 81] that a new corporation called MacAndrews & Forbes Company should be organized in New Jersey and acquire the business of the latter two. Accordingly, the new MacAndrews & Forbes Company, capital $7,000,000—$4,000,000 preferred, without voting power, and $3,000,000 common—was incorporated "for trading and manufacturing," etc. [see Charter, Ex. 17, R. V, 63], and Continental Company acquired more than two-thirds of the common stock by simply agreeing to purchase its supply of paste from the new company at 7½ cents per pound. The American Tobacco Company now holds $2,112,900 of the common stock and $750,000 preferred.

In June, 1902, MacAndrews & Forbes purchased the business of Stamford Manufacturing Company, taking the usual covenants, and also incorporated

the National Licorice Company (since in agreement), which acquired the business of Young & Smylie and F. B. & V. P. Scudder, taking the usual covenants. The National Licorice Company then agreed with MacAndrews & Forbes not to produce licorice for tobacco manufacturers.

During the summer of 1902 the only formidable competitors were the Young Company and John D. Lewis, and to drive these out of business the MacAndrews & Forbes Company sold licorice far below cost. Thereafter they all agreed not to compete and to maintain arbitrary prices [see Exs. 25, 26, 27, and 28, R. V, 95 *et seq.*]; and an apportionment of business was made. Lewis' output was limited to 1,000,000 and Young's to 5,000,000 pounds, and certain manufacturers were allotted to each as customers.

In 1903, by agreement between the Young Company and MacAndrews & Forbes Company [see Ex. 24, R. V, 89], J. S. Young Company, a new corporation with $800,000 capital, was organized, which took over the former's business. MacAndrews & Forbes Company received the majority shares of the common stock (which alone had voting power) for guaranteeing the annual sale of 5,000,000 pounds of paste. The association was for a long time concealed and denied. [See R. III, 343.]

In 1906 an indictment under the Sherman Act was found against MacAndrews & Forbes Company and J. S. Young Company, and conviction followed. The former, after the indictment, acquired all stock

and then took a conveyance of plant and business of the latter company and now carries on the same. It has secured complete control of and has monopolized the importation of licorice root and the manufacture, sale, and distribution of its products. Of the 35,000,000 (40,000,000) pounds annually consumed in United States, MacAndrews & Forbes manufacture exceeding 95 per cent, and their importations of raw material is a larger percentage of the whole. It has agreements to supply all defendants at remunerative prices which enables it when expedient to sell any excess below cost to destroy competition. [See Ex. 8, R. V, 19; Ans. A. T. Co. R. I, 227–231.]

THE MANHATTAN BRIAR PIPE COMPANY (MARION, N. J.)—Capital $350,000. In 1902 The American Tobacco Company acquired at a cost of $468,534, control of Brunswick Briar Pipe Company, manufacturer of pipes, cigar and cigarette holders, and organized The Manhattan Briar Pipe Company in New Jersey, all of whose stock it owns, and this took over the business of the old concern. It subsequently acquired the stock of the Baltimore Briar Pipe Company and now carries on an extensive business as maker and distributor of pipes, etc.

R. A. PATTERSON TOBACCO COMPANY (RICHMOND, VA.)—Capital $150,000—smoking tobacco. During 1903, and subsequently, the Continental Company for $926,250 acquired all the stock, taking the usual covenants [see Ex. 36, R. V., 172]. This company has

concealed and denied association with defendants, advertised itself as independent (see Ex. 64, R. V., 500), and practiced many unfair trade methods. [In 1907 its output was 5,145,528 pounds of smoking tobacco and 2,277,162 of plug—Exs. 78 and 79, R. V.]

R. P. RICHARDSON, JR., & COMPANY, INC. (REIDSVILLE, N. C.)—Capital $300,000—smoking tobacco. In 1903 The American Tobacco Company acquired a majority of the shares, taking covenants not to compete or engage in the business. A separate organization has been preserved. . Its output for 1906 was about 1,000,000 pounds. [The original owners of this business are in litigation with the trust seeking to avoid its control and assented to the decree below.]

THOMAS CUSACK COMPANY (CHICAGO)—Capital $250,000. In 1903 The American Tobacco Company by agreement with Thomas Cusack, of Chicago, engaged in sign and advertisement painting, organized in New Jersey the Thomas Cusack Company, capital $250,000 ($100,000 preferred, $150,000 common, the latter alone having voting power), which was issued to Cusack, and he in turn assigned $100,000 common stock to The American Company for no other consideration than its cooperation in organizing the new company. [This company has an enormous sign painting business.]

PINKERTON TOBACCO COMPANY (ZANESVILLE, OHIO)—Capital $100,000—scrap tobacco. In 1903 Continental Tobacco Company acquired two-thirds of the capital stock, with the usual covenants. This con-

nection was persistently concealed and denied and the company used to destroy others. [Its output for 1907 was 4,324,131 pounds of smoking tobacco—Ex. 78, R. V.]

AMSTERDAM SUPPLY COMPANY—Capital $225,000—Organized in 1903 by American Tobacco Company for purchasing all kinds of supplies (except leaf tobacco) for defendants, who in order to avoid buying in open market appointed it their general agent with power to determine prices. [Its annual purchases exceed $25,000,000. Certain defendants are stockholders and obligated to purchase through this company—R. III, 282.]

JOHN W. CARROLL TOBACCO COMPANY—Capital $425,000—manufacturers and distributers of tobacco. In 1905 The American Company acquired control of Carroll Brothers, Lynchburg, Va., and with the partners organized in New Jersey the John W. Carroll Tobacco Company, which took over the old business, with covenants against competition and the plant was closed.

NALL & WILLIAMS TOBACCO COMPANY (LOUISVILLE, KY.)—Capital $116,800—manufacturer and distributer of tobacco products. In 1905 defendants purchased all the stock for $438,000 cash. Its separate organization has been preserved, but its association with defendants was concealed and denied and the company used to cripple opponents and destroy competition. [In 1907 its output was 3,489,052 pounds of plug and 174,362 of smoking tobacco—Exs. 78 and 79, R. V.]

NASHVILLE TOBACCO WORKS (TENN.)—Capital, $120,000—plug tobacco. In 1906 The American Tobacco Company for $247,780 acquired the stock, with the usual covenants. This company acquired the business and assets of Britain Tobacco Works, at Columbia, Tenn., and closed the plant. [Its output for 1907 was 670,461 pounds of plug and 56,731 of smoking tobacco. Exs. 78 and 79, R. V.]

DAY & NIGHT TOBACCO COMPANY—Capital, $400,000. In 1906 The American Company acquired control of the old Day & Night Tobacco Company, Duwel Brothers Tobacco Company, August Schroer Tobacco Company, and Queen City Tobacco Company, all of Cincinnati, manufacturers of scrap tobacco. It thereupon organized in Ohio the Day & Night Tobacco Company (capital, $400,000) and caused it to take over the business of the four companies. The American Company (for $400,000 cash) at once acquired and now holds all the shares. The relationship was long denied and the company used to cripple opponents and destroy competition by unfair and oppressive trade methods. [In 1907 its output was 2,726,643 pounds of smoking tobacco. Ex. 78, R. V.]

Other concerns now in operation and under control of The American Tobacco Company and its subsidiaries follow: American Machine & Foundry Company—capital, $100,000—manufacturer of machinery; International Cigar Machinery Company—capital, $10,000,000—manufacturer of cigar ma-

chines; New Jersey Machine Company—capital, $100,000—manufacturer of machinery; Garson Vending Machine Company—capital, $50,000—engaged in exploitation of patents for vending cigars; Crescent Cigar & Tobacco Company—capital, $20,000—tobacco jobber.

The American Tobacco Company also owns $900,000 stock of Acker, Merrall & Condit Company, largely engaged in the grocery and cigar business; and $1,684,500 of capital stock of Standard Tobacco Stemmer Company, engaged in exploiting patents for stemming leaf tobacco.

AMERICAN CIGAR COMPANY—CIGAR COMBINATION (Par. XII, R. I, 74).

Prior to 1901 the American and Continental tobacco companies manufactured, sold, and distributed cigars, stogies, and cheroots. They then determined to enter that business upon a larger scale and through a combination destroy competition and acquire a monopoly. Under agreement [see Ex. 35, R. V, 165] with Powell, Smith & Company, large manufacturers and dealers in cigars, they caused the incorporation in New Jersey of the American Cigar Company "for trading and manufacturing," etc. [see Charter, Ex. 15, R. V, 52], to which all three conveyed their said business, and it has since carried on the same. The American and Continental companies each acquired 46½ per cent of the shares, and Powell, Smith & Company 7 per cent; the original capitalization was $10,000,000 (afterwards

$20,000,000), and more than three-fourths is owned by the former.

The Cigar Company pursuing the general plan acquired many competitors (partnerships and corporations) engaged in interstate and foreign commerce, taking from the parties the usual covenants (specified in Petition, R. I, 76–79); and it has also procured the organization of controlled corporations which have acquired competing manufacturers, jobbers, and distributors in the United States, Cuba, and Porto Rico. It manufactures, sells, and distributes a large percentage of domestic cigars; is the dominating factor in the tobacco business, foreign and domestic, in Cuba and Porto Rico, and is there engaged in tobacco planting. [See evidence, Cobb, R. III, 24, 25, 26, 27, 79, &c.] It has an organized department for the purchase of cigar leaf, with agents in all important markets and factories in various States and abroad; and it sells, ships, and distributes the output to all States. It is one of the instrumentalities by which under the general plan competition is destroyed, interstate and foreign commerce restrained, and complete monopoly attempted.

Some corporations which the Cigar Company alone, or with other defendants, controls follow (R. I., 76–79)—

HAVANA TOBACCO COMPANY—Capital $34,500,000—a holding company with the majority stock of five corporations which manufacture cigars in Cuba and together produce and export the larger part of all

cigars exported from that island, viz: Havana Commercial Company, capital $15,500,000; H. de Cabanas y Carbajal, capital $1,500,000; J. S. Murias & Company, capital $750,000; H. Clay & Bock Company, capital $1,600,000 (bonds $826,000); Havana Cigar and Tobacco Company, capital $2,527,000 (bonds $1,262,600).

HAVANA-AMERICAN COMPANY—(Capital $250,000)—manufacturer and distributer of cigars; CORP. J. & B. Moos—jobbers at Chicago, capital $150,000; FEDERAL CIGAR COMPANY—capital $200,000; CUBAN LAND & LEAF COMPANY—capital $100,000 [this company owns plantations and raises tobacco in Cuba]; PORTO RICAN-AMERICAN TOBACCO COMPANY—Capital $1,999,000; PORTO RICAN LEAF TOBACCO COMPANY—Capital $500,000—engaged in tobacco planting, etc., in Porto Rico.

The Cigar Company also controls corporate jobbers in California, Alabama, Virginia, Pennsylvania, Georgia, Louisiana, New Jersey, and Tennessee. [Its output for 1907 was 2,500,000 cigarettes and 854,061,931 cigars—Exs. 77 and 83, R. V.]

CONSOLIDATED TOBACCO COMPANY. (Par. XIII, R. I, 81.)

In June, 1901 (about the time the Cigar Company became very active and fight was on in England), pursuing the general scheme, parties largely interested in the American and Continental companies caused incorporation in New Jersey of Consolidated Tobacco Company, capital $30,000,000 (afterwards

$40,000,000), with broad powers and perpetual existence; to do business throughout the world, and to guarantee securities of other companies, etc. [See Charter, Ex. 13, R. V, 45. A majority of shares was taken by a few individuals connected with the old concerns: A. N. Brady, J. B. Duke, A. H. Payne, Thomas Ryan, W. C. Whitney, and P. A. B. Widener—Ex. 49, R. V, 423.] J. B. Duke, president of both the old companies, became president of the Consolidated. Largely in exchange for bonds the new company acquired substantially all common shares of the old ones. Its business of holding and financing, with enormous profits, was continued until 1904 [Financial Statement, Ex. 52, R. V, 462–465] when with the American and Continental companies it was merged into The American Tobacco Company. (R. I, 92.)

THE AMERICAN STOGIE COMPANY. (Par. XIV, R. I., 82.)

In May, 1903, the American Cigar Company and The American and Continental tobacco companies caused the American Stogie Company to be incorporated in New Jersey, with $11,976,000 capital, which immediately took over their stogie and tobie business in exchange for $8,206,275 stock and then in the usual ways acquired the business of others in the manufacture, sale, and distribution of such products, with covenants not to compete (R. I., 82–84). It acquired in exchange for $3,647,725 stock all shares of United States Cigar Company (which

had previously acquired and owned the business of important competitors) and subsequently took a conveyance of the plant and assets. The majority shares always have been held by defendant, the American Cigar Company. [Its output for 1907 was 92,091,314 stogies, tobies, etc.—Ex. 83, R. V.]

ENGLISH COMPANIES AND AGREEMENTS. (Par. XV, R. I, 85.)

Formerly many separate competing concerns with plants located in Great Britain, directly or indirectly bought leaf tobacco in the United States and manufactured, sold, and distributed the products in that country, the United States, and elsewhere. Many of these were old, well established, with large assets and world-wide reputations. [See Ans. A. T. Co., R. I, 245.]

Prior to 1901 The American Tobacco Company and subsidiaries determined to push vigorously the sale of their goods in the United Kingdom [see Ex. 39, R. V, 208], and for that purpose (September, 1901) purchased [for $5,347,000, Harris, R. II, 50] a Liverpool corporation—Ogden's, Limited—there engaged in manufacturing and distributing tobacco products. Through this, and otherwise, special efforts were made and a fierce trade conflict arose between them and the English manufacturers. Alarmed by the situation, many of the latter with the major portion of the trade determined to combine [for combining companies, see Ex. 29, R. V, 106], and in 1901 they incorporated The Imperial Tobacco

Company of Great Britain and Ireland, capital 15,000,000 (afterwards 18,000,000) pounds sterling, and in exchange for stock transferred to it their business and plants, which together with subsequent acquisitions it has since operated and conducted.

During 1901 and 1902 there was fierce commercial conflict between the two combinations. [The Imperial offered large bonuses to dealers handling its goods exclusively, and its opponents agreed to distribute to British customers during four succeeding years all profits, and in addition 200,000 pounds sterling annually—see Ex. 39, R. V, 216.] Subsequently, defendants determined to end competition and parcel out the world, assigning exclusive fields for operation without competition.

Accordingly, in September, 1902, the Imperial Company, Ogden's (Limited), the American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, and parties in behalf of the British-American Company (Limited) entered into two written agreements (see Exs. 1 and 2, R. I, 111–133), stipulating, among other things, that the Imperial Company should limit its business to the United Kingdom and especially should retire from the United States, except to sell to other defendants and to buy and treat leaf tobacco for its own use; that it should take over the plant and business (except export) of Ogden's (Limited), in exchange for stock; that the American companies should limit their operations to the United States, its dependencies, and Cuba, and especially retire

from the United Kingdom (except selling to the Imperial Company); that the British-American Company (Limited), should be incorporated under English law with capital of 6,000,000 pounds sterling (apportioned one-third to the Imperial Company and two-thirds to the American companies), to do business throughout the rest of the world, to which the others, with stipulations against competition, should convey their "export business" (meaning thereby the manufacture of tobacco to be used outside of the United Kingdom and the United States, and dealing in the same within such territory); that any of the parties might manufacture and within its territory deal in the brands and be the sole customer of all the others; that the directors of both combinations should enter into personal covenants against engaging in the business outside of their allotted territory, and that none should sell to any person when there was reason to believe he intended to export the article into the territory of another (see Exs. 1, 2, 3, and 4, R. I, 111–138). The agreements were immediately carried into effect and have been strictly observed by all the parties.

In exchange for Ogden's, Limited, a large amount of The Imperial Company's stock [for good-will and other tangible assets, 1,500,000 pounds—for tangible assets 1,217,000 pounds] was issued to The American Tobacco Company, and the latter has since been allowed to select three directors. [At present they are James B. Duke, William R. Harris (defendants), and R. H. Walters.]

The Imperial Company was formed to associate in combination the great English manufacturers and has since controlled and monopolized the trade within the United Kingdom. Formerly it sold abroad large quantities of goods made from leaf grown in the United States and purchased in competition. Under the agreements of September 27, 1902, that business was abandoned. Necessary leaf tobacco is now purchased through many agents in this country under a resident general agent and is exported as a part of foreign commerce. During the year 1906 these purchases aggregated 54,000,000 pounds, and as a result of the agreements aforesaid were made without competition with the other defendants.

The British-American Tobacco Company, Limited, was incorporated (September 27, 1902) under the laws of Great Britain with 6,000,000 pounds sterling capital, issued and now held one-third by The Imperial Company and two-thirds by The American Tobacco Company. The memorandum of association (R. I, 139–143) recites as one of its purposes—

> (139) To adopt, enter into, and carry into effect, with or without modification, an agreement proposed to be made between The Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the first part; Ogden's, Limited, of the second part; The American Tobacco Company, of the third part; Continental Tobacco Company, of the fourth part; American Cigar Company, of the fifth part; Consolidated Tobacco Company, of the sixth part; and Williamson Whitehead Ful-

ler and James Inskip, on behalf of a company intended to be formed under the Companies Acts, 1862 to 1900, with the name of British-American Tobacco Company, Limited, of the seventh part.

Having received, as agreed, from the other contracting companies conveyances of their "export business" and the property used in connection therewith, including the stock of many foreign corporations, the British-American Company entered upon and ever since has been engaged in interstate and foreign commerce in leaf tobacco and in the manufacture and distribution of tobacco products throughout the world, but refrains from competition with any defendant. It was created for the special purpose of defeating and violating the laws of the United States; William R. Harris, Vice-President of The American Tobacco Company, is its principal officer, and maintains a branch office in New York City. This company uses large quantities of domestic leaf [during 1906, 47,737,293 pounds—Ex. 20, R. V, 76], partly exported to various plants abroad and about half manufactured here and then exported. By agreement, all this is purchased through The American Tobacco Company without competition with any other defendant. In addition to many plants abroad it has warehouses in various States and plants at Petersburg, Va., and Durham, N. C., where tobacco is manufactured and then exported. [In 1907 its manufactured output in the United States was—Cigarettes, 1,805,117,150; Plug and Twist, 4,866,419 pounds—See Ex. 84 R. V.]

THE MERGED COMPANY OF 1904 (Par. XVI, R. I, 92).

By proceedings in New Jersey, October, 1904, The American Tobacco Company (old), Continental Tobacco Company and Consolidated Tobacco Company were merged into one under the name of The American Tobacco Company (Ex. 7, R. I, 150). The merged company, with perpetual existence, was capitalized at $180,000,000 ($80,000,000 preferred, ordinarily without power to vote) and empowered—

> To buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms; * * * to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder; * * * to carry on any business operations deemed by such merged corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property or stock; * * * to conduct business in all other States, territories, possessions and dependencies of the United States of America, and in all foreign countries; * * * to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock or of any bonds, securities, or other evidences of indebtedness created by any other corporation or corporations of this or any other State or government, and to issue its own obligations in payment or in exchange therefor. * * * (Ex. 7, R. I, 152.)

Prior to the merger the Consolidated Tobacco Company, a majority of whose $40,000,000 share capital was held by J. B. Duke, Thomas F. Ryan, William C. Whitney, Anthony N. Brady, Peter A. B. Widener and Oliver H. Payne, had acquired nearly all common shares of both old American and Continental companies, and thereby control; but the preferred shares were held by many individuals. Under the merger, shares held by one merging company in another were canceled, and in this way the old common stocks were retired, except about $242,450. For preferred stock in the old American Tobacco Company 6 per cent bonds of the merged company ($133⅓ for each $100) were issued, and for Continental preferred stock, like bonds ($116⅔ for each $100). Holders of 4 per cent Consolidated Company bonds exchanged them for the merged company's preferred stock and 4 per cent bonds in prescribed proportions; and the holders of Consolidated Company's stock and $242,450 common of the old companies received the total issued common stock of the merged one—$40,242,400. It resulted that the same six men in control of the combination through the Consolidated Tobacco Company continued it by ownership of stock in the merged or new American Tobacco Company. [See Ex. 7, R. I, 150; Ex. 8, R. V, 1; Ex. 14, R. V, 50; Ex. 47, R. V, 389, 390; Ex. 49, R. V, 423–426; Ex. 51a, R. V, 461.]

The assets, property, etc., of the old companies passed to The American Tobacco Company (merged), which has since carried on the business of all and now operates as branches plants manufacturing cigarettes,

little cigars, and cheroots, plug and smoking tobacco, at Richmond, Danville, and Newport News, Va.; Baltimore, Md.; New Orleans, La.; New York City; St. Louis; Chicago; Durham, N. C.; Louisville, Ky.; Clarksville, Tenn.; Middletown, Ohio; Petersburg, Va.; and Owensboro, Ky. The products of these, with those of certain other defendants, are collected and then through the selling department, located in New York City, acting by agents, traveling and stationed, drummers, wholesalers, retailers, and others, in the various States, are sold and shipped all as a part of interstate and foreign commerce. Hundreds of selling and distributing agencies throughout the various States are controlled and utilized.

Through an organized buying department, with special agents in all markets for itself and other defendants, especially P. Lorillard Company, Blackwell's Durham Tobacco Company, The John Bollman Company, Spaulding & Merrick, F. F. Adams Company, and S. Anargyros, The American Tobacco Company buys large quantities of leaf which is shipped from one State to another.

It has acquired many, and exercises dominion over other, jobbers, wholesalers, dealers, and distributers in the various States by loaning them large sums and giving unusual credit and secret rebates. In this and other ways dealers and distributers are forced to give preference to defendants' products and hinder competitors.

The American Tobacco Company, in its own name or through others, owns controlling interests in the

stock of the other corporate defendants (except Imperial Tobacco Company) and dictates the election of their directors. All are engaged in interstate and foreign commerce in leaf tobacco, its products and related articles. By agreement they refrain from competition and cooperate to secure the retirement (except in association with them as employees or otherwise) of successful, capable persons engaged in the trade, to exclude others therefrom, to destroy competition and to monopolize the same.

PROFITS (Par. XVII, R. I, 93).

The profits accruing to the conspirators have been enormous. (See Appendixes "*N*" to "*Q*.")

In 1890 the share capital of The American Tobacco Company was $25,000,000—$10,000,000 preferred, $15,000,000 common—nominal assets balanced this. [The tangible assets as shown by the report of the Bureau of Corporations to the Senate, June 5, 1909, were $3,545,108.] The stock was increased to $35,000,000 and then $70,000,000 ($14,000,000 preferred). On preferred shares until the merger of 1904 eight per cent. annual dividends were paid; on the common from six to twenty-nine per centum. [In 1899, one hundred per cent. in stock and 6 per cent. cash—see Ex. 39, R. V, 201.] The ledger assets according to statement for 1903 were $86,000,000 (R. I, 99).

The outstanding stock of the Continental Company in 1899 was $48,844,600 preferred—$48,846,100 common (the Report of the Bureau of Corporations declared the common was water). Except in 1899

when the rate was three and one-half, seven per cent. per annum was paid on the preferred; on the common two per cent. in 1901, thirteen in 1902, and sixteen in 1903. Ledger assets at the end of 1903 were $120,000,000 (R. I, 97–99).

In 1901 the Consolidated Company was organized and acquired the common stock of The American and Continental companies, giving for each one hundred dollars of the former $200 four per cent. bonds and for the latter equal amounts of bonds. The stock of the Consolidated Company was originally $30,000,000—afterwards $40,000,000. A dividend of twenty per cent. was paid during 1902. The net surplus from the 1903 earnings exceeded $10,000,000 and the annual statement showed total assets exceeding $214,000,000 (R. I, 99).

In 1904 the three old companies were merged; $133⅓ six per cent bonds were given for each $100 preferred stock of The American Tobacco Company and $116⅔ for each $100 preferred stock of the Continental; and similar exchanges were made of other securities. The holders of the Consolidated Tobacco Company shares obtained the common stock of the merged company upon which since 1904 they have received dividends varying from twenty to thirty-two per cent per annum. The total assets shown in 1906 statement exceed $278,000,000—accumulated surplus $30,000,000, and the net surplus from that year's earnings, after deducting dividends and expenses, exceeded $6,750,000 (R. I, 100–101).

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RESULTS OF THE COMBINATION, ETC. (Par. XVIII, R. I, 102).

[Through stock ownership The American Tobacco Company controls all the defendant corporations except the Imperial Company. The admitted relationship is shown by Ex. 87, R. V, and all report directly or indirectly to American Tobacco Company.]

The Imperial Company, in which The American Company is a large stockholder (now 750,000 pounds), combined the most powerful English concerns, formerly competitors in foreign trade and commerce in American leaf tobacco and in manufacturing, selling, and distributing its products throughout the world, including the United States; it now controls and monopolizes such trade, manufacture, and commerce within its allotted territory—the United Kingdom—and observes the agreements of September 27, 1902 (Exs. 1 & 2, R. I, 111–133), which destroy competition. It purchases some American leaf from dealers in England, but secures its principal supply through a general agency in the United States, with subagents in States where desired types are sold. Through this, and as a part of interstate and foreign trade and commerce, more than 50,000,000 pounds of leaf are annually purchased and shipped to England without competition with the other defendants. While rivalry may exist among agents, the extinction of genuine competition is the inevitable result of existing conditions.

The British-American Tobacco Company, whose stock is held one-third by The Imperial and two-thirds

by The American Company, was created for effectuating the illegal arrangements of September, 1902; and has acquired many foreign concerns and monopolizes foreign trade and commerce in American tobacco. This company requires annually 50,000,000 pounds American leaf, which The American Company purchases for it without competition with any other defendant. About one-half of this is exported; the remainder is converted into manufactured products in this country and sold abroad, being more than 90 per cent of such trade.

Through The American Company and controlled companies by unlawful contracts, combinations, and conspiracies defendants have acquired outright ownership or control (with few exceptions) of the important domestic establishments formerly competitors in the manufacture of smoking tobacco, plug, snuff, cigarettes, little cigars, tin-foil, and licorice paste, and in interstate and foreign commerce in leaf tobacco and such products; by agreements they have obligated hundreds of successful men to refrain from trade and commerce therein, and have destroyed competition and acquired a monopoly; they have become so powerful that successful competition by a new concern would be practically impossible.

Through the American Cigar Company defendants have a dominating influence over and prevent competition and unlawfully restrain trade and commerce between the United States, Cuba, and Porto Rico, and among the several States, in cigars and leaf tobacco, and are attempting to monopolize the same.

Through American Snuff Company they monopolize interstate and foreign commerce in snuff; have destroyed competition and are unlawfully restraining interstate and foreign trade and commerce.

Through MacAndrews & Forbes Company they monopolize interstate and foreign trade and commerce in licorice root, licorice paste, and other products; have destroyed competition and are unlawfully restraining commerce.

Through Conley Foil Company they monopolize interstate and foreign trade and commerce in tinfoil; have destroyed competition and are unlawfully restraining commerce.

[They are likewise engaged in many other branches of trade through companies named in the petition; and all are used to acquire monopolies.]

The necessary leaf for all defendants is purchased under a common control by special agents abroad and in all important domestic districts, directly from the growers or at central markets in various States, and is then shipped to warehouses and factories in other States and abroad. Of domestic leaf, without competition among themselves, they annually acquire 20 per cent of the cigar type and more than two-thirds of all others—of some more than 80 per cent. By reason of their power in combination they dominate the market and have a controlling influence upon prices. During the year ending September 1, 1906, they purchased approximately 475,000,000 pounds of domestic leaf; and during the following year their purchases were probably a larger proportion of the

whole. [For details of defendants' purchases not including Imperial Co., see Ex. 76, R. V; also *post*, p. 223.]

By agreements among them, all supplies (except leaf) for defendants are purchased through the Amsterdam Supply Company, and thus competition has been destroyed.

The manufactured output of all is advertised, sold, and distributed under a common oversight, through agents and dealers throughout the various States and abroad as a part of interstate and foreign commerce, and without competition. The larger part (except that of The Imperial Tobacco Company and British-American Tobacco Company) is advertised, sold, and distributed through the sales department of The American Tobacco Company, which fixes prices and determines everything in connection therewith.

Certain defendant companies, especially the American Snuff Company, American Cigar Company, R. J. Reynolds Tobacco Company, R. A. Patterson Tobacco Company, Standard Snuff Company, Pinkerton Tobacco Company, F. R. Penn Tobacco Company, Day & Night Tobacco Company, Wells-Whitehead Tobacco Company, Nall & Williams Tobacco Company, maintain separate purchasing and sales departments, with agents in many States, and through them and otherwise they buy leaf, sell and distribute their products; but all report, directly or indirectly, to The American Tobacco Company, which has ultimate control, decides how and where the others may operate, fixes prices, and prevents competition.

[For officers and directors of the more important companies, see Exs. 42–46, R. V, 342–361.]

All business of defendants is conducted without real competition amongst them and as a part of a general plan, agreement, combination, and conspiracy to destroy competition, drive out opponents, and deter others from entering. They have already disposed of most opponents and have obtained such power that the remaining few conduct their business in the well-grounded fear of swift destruction whenever defendants decide to eliminate them. The mere withholding or withdrawal of their numerous brands from dealer, jobber, or retailer would probably render his success impossible. [For list of leading brands see Exs. 62, 63, 64, R. V, 488–492.] The opportunities for new competitors are constantly being closed; the agencies for distribution are rapidly coming under their undisputed control; and unless prevented and restrained their complete unchallenged dominion of every branch of commerce in tobacco and its products may be confidently expected at an early day.

The petition details the output of manufactured tobacco products by defendants and totals for the United States in 1906. [For output 1907 see *ante*, p. 18; and for each year since 1890 see Appendixes "F" to "M" hereto.]

PRAYER (Par. XIX, R. I, 107).

1. That the contracts, combinations, and conspiracies, attempts to monopolize and the monopolies described be declared in violation of the act of July 2,

1890, and subsequent acts, and be prevented and restrained.

2. That the contracts, combinations, and conspiracies entered into September 27, 1902, and thereafter, and evidenced by the English writings of that date (R. I, 111–133) be declared illegal, and that defendants be prohibited from doing anything in pursuance thereof within the United States.

3. That The Imperial Tobacco Company, its officers, agents, and servants be enjoined from engaging in interstate or foreign trade and commerce, within the United States, until they shall cease to observe the agreements of September 27, 1902 (R. I, 111–133).

4. That the British-American Tobacco Company be adjudged an unlawful instrumentality created to carry into effect the objects and purposes of the contracts of September 27, 1902, and that it be enjoined from engaging in interstate or foreign commerce within the United States.

5. That it be adjudged that The American Tobacco Company, the American Snuff Company, the American Cigar Company, the American Stogie Company, the MacAndrews & Forbes Company, and The Conley Foil Company is each itself a combination in restraint of commerce; and that each is attempting to monopolize and has monopolized part of commerce. And that each of them be restrained from engaging in interstate or foreign commerce;

or, if the public interests will be better subserved thereby, that receivers be appointed to take possession of all their property, assets, business and affairs, wind them up, and otherwise take such course as will bring about conditions in harmony with law.

6. That holding stock by one defendant corporation in another be declared illegal and that they be enjoined from continuing to hold or own such shares and from exercising any right in connection therewith or permitting the exercise of any such right.

7. That defendants be enjoined from continuing to carry out the purposes of the above-described contracts, combinations, conspiracies, and attempts to monopolize by the means herein described, or any other, and be required to withdraw from all connection therewith.

8. That they be enjoined from purchasing leaf tobacco or from selling and distributing its manufactured product as a part of interstate and foreign trade and commerce in conjunction or combination, and from taking part or being interested in any agreement or combination intended to destroy competition.

And for General Relief and Process.

XI.

Answers and Admissions.

Welford C. Reed answered and afterwards died—there has been no revivor. R. P. Richardson, Jr., & Company, Inc. (which has not appealed), United Cigar Stores Company, and The Imperial Tobacco Company each appeared by different counsel and answered. The British-American Tobacco Company filed a separate answer; The American Tobacco Company and all remaining defendants filed a joint and separate answer.

Certain written admissions (Ex. 8, R. V, 1) were entered for all the defendants except the Richardson Company and the Imperial Company, and were accepted by the latter subject to correction if shown to be untrue (R. II, 4). Following the paragraphs of the petition, these specify the allegations agreed to—generally those which relate to acquisitions, formation of companies, profits, etc. Among other things this appears (R. V, 31)—

> We admit that all the vendors and corporation defendants mentioned in the petition as engaged in the manufacture and sale of tobacco products, except Imperial Tobacco Company, Ltd., purchased or now purchases some or all of the requisite raw material in States or countries other than those in which the factories were or are located, and had or has it transported thence through the medium of common carriers to said factories, and employed or employ traveling salesmen who solicited or solicit in States or countries other

than those in which the factory was or is located, orders for the tobacco products which by them were or are transmitted to said factory or other chief office of the manufacturer, and, if approved, they are filled by the delivery of the goods to a common carrier where the factory was or is located, duly consigned to the purchaser, title passing to said purchaser on said delivery to the common carrier.

ANSWER OF THE AMERICAN TOBACCO COMPANY AND OTHERS (R. I, 204–263).

This fills fifty-nine pages. It admits, specifying details, the organization of various companies, purchase by them of sundry plants and businesses with good will and covenants by the vendors, and the general unification of interests through consolidations and acquisitions of stock, all substantially as alleged. It denies intent to destroy competition or acquire monopoly; and further declares that no purchase was made to remove the competition of a vendor—brands, properties and businesses having been bought for investment only with a view to their present and ultimate profitableness, all as permitted by State charters.

It declares that the various companies, a majority of whose stock is held by some other, are either run as branches of the owner—the separate organization being preserved for trade purposes—or that they are managed by minority stockholders and are uncontrolled by and in active competition with the owning

companies and with each other; and that interstate and foreign commerce have not been restrained or monopolized.

> Competition between The American Tobacco Company and various other tobacco manufacturing companies is the same whether The American Tobacco Company owns all the stock, a part of the stock, or none of the stock at all, for these various corporations, except those like Blackwell's Durham Tobacco Company, which are in fact only branches of The American Tobacco Company, conducted as separate corporations only for trade method or trade-mark purposes, have their own leaf buying plants, and their own selling organizations, and it would serve no profitable purpose to anyone, but would be destructive of the tobacco business, to attempt to eliminate or lessen competition. In truth, the competition between different similar brands of tobacco owned by the same manufacturer is just the same as if there were not such common ownership. (Ans. R. I, 220, 221.)

Touching the allegations that unification of buying has given defendants power to control prices of leaf tobacco, manipulate the market, etc., they say (R. I, 261)—

> The presence or absence of any given amount of competition in the purchase of leaf tobacco can have no permanent effect on the prices paid for such leaf tobacco. If there were an absolute monopoly in the purchase of leaf tobacco, a fair price would have to be paid or the land would go into these other crops; and

> if by many competitors bidding for leaf tobacco or otherwise, more than a fair price should be paid, there would result the growth of an oversupply of tobacco, which oversupply could only be stopped by a reduction in the price. Therefore, The American Tobacco Company has never had the slightest interest in eliminating competition in the purchase of leaf tobacco, and in those cases where it has bought for other manufacturers, or had other manufacturers buy for it, it has been actuated only by a desire to make more efficient and economical the organization for buying, and not at all the withdrawal of competition.

All unlawful action is denied; the benign purpose of the agreements by which the consolidations and unifications have been brought about are dwelt upon; and the present existence of divers successful competitors and the possibility of future ones are pointed out.

The execution and observance of the English contracts of 1902 are admitted. It is said, however, that these were valid where made and were not entered into for the purpose of destroying competition or restraining commerce but in connection with valid sales of property and business. Among other things this answer says of the English situation (R. I, 245–247)—

> Long before The American Tobacco Company was organized and until the formation of The Imperial Tobacco Company, to be hereafter referred to, the largest tobacco manufacturing

house in England was W. D. & H. O. Wills, Ltd., of Bristol, a very old, reputable, skillful, and successful manufacturer. The products of the said Wills had an excellent reputation and sale all over the world, and, notwithstanding the great disadvantage that said English house was in competition with American manufacturers, because of a high tariff tax, the tobaccos manufactured by the said Wills had considerable sale and a very excellent reputation substantially all over the United States. * * *

In December, 1901, said W. D. & H. O. Wills, Ltd., and other English manufacturers caused the formation of The Imperial Tobacco Company (of Great Britain and Ireland), Ltd., and these various manufacturers sold their businesses to the said The Imperial Tobacco Company.

Expansion and ever increasing power are thus explained (R. I, 259, 260)—

The American Tobacco Company has been a successful and growing corporation engaged in the tobacco business; its officers and employees have been practical tobacco men; investors in its securities have had confidence in its management. These officers and employees have kept in touch with the tobacco trade and have given study to the tobacco business; they have made investments of the money of the security holders of the company from time to time in tobacco brands, not with a view of lessening the competition against the brands already in existence, and not with a view of monopolizing the business, but because the tobacco business was the business in which they were engaged,

the business which they were best capable of running, and the business of whose value they were best able to form a judgment when about to make an investment. Most of the brands acquired have been taken into the organization and thereafter have been manufactured and sold by the regular organization of The American Tobacco Company. The brands have naturally improved in quality under this condition, because they have had the benefit of the efficient manufacturing organization and the ample leaf supply of The American Tobacco Company. The percentage of expenses of selling have diminished, because the selling organization of The American Tobacco Company already covered the whole country. * * *

Sometimes, though, The American Tobacco Company has realized that the marketing of some particular product could be best done by leaving it in the hands of the previous owners, or by putting its selling into some organization other than that of The American Tobacco Company. When this has seemed best The American Tobacco Company has left it in the separate organization, and while always willing to give such organization the benefit of its knowledge of the trade, has left such organization to work out its own salvation, aided by information and advice from The American Tobacco Company's organization, but never controlled or compelled by such organization. In some of these cases the selling has been by a different organization, while the manufacturing and leaf purchasing has been by The American Tobacco Company's organization. If so, it was because

of the deliberate belief of The American Tobacco Company's organization that its facilities for manufacturing or buying leaf were more efficient or economical than would be the manufacturing or buying organization of the separate corporation. Sometimes, as in the case of the American Snuff Company and the Imperial Tobacco Company, it has made an investment and secured a minority of stock in a tobacco business, leaving the power of control, as well as the actual direction, in other bands.

ANSWER OF THE UNITED CIGAR STORES COMPANY (R. I., 190–197).

This denies generally most of the allegations in the Petition, but admits—

Incorporation in New Jersey (May, 1901) by George J. Whelan and associates, who conducted the business for several months and demonstrated its probable success; issued capital stock $1,650,000, bonded indebtedness $2,850,000; that in November, 1901, The American Tobacco Company acquired a majority of the shares and now holds $600,000 of the $900,000 common stock, all of the preferred ($750,000) and all the bonds—$2,850,000; ownership of stock in sundry companies; establishment of stores in different cities and efforts to secure retail business; buying out dealers in tobacco products and taking covenants not to engage in the business; and that some of the vendors are intimately connected with its affairs.

It denies all unfair trade methods, any attempt to monopolize, that it is improperly used to increase the sale of tobacco products of other defendants, or to cripple their competitors, or that it has procured and forced the retirement of many retailers.

[The Answer of The American Tobacco Company undertakes to describe how control of this company was acquired.—R. I, 225.]

ANSWER OF R. P. RICHARDSON, JR., & COMPANY, INC. (R. I., 265–279).

This first admits most of the allegations and then says: Defendant and its predecessors located at Reidsville, N. C., have been long successfully engaged in interstate commerce, buying tobacco in different States and selling and distributing the products manufactured therefrom in many of the States of the United States but not abroad; chartered and organized in New Jersey in 1903; The American Tobacco Company never legally acquired a controlling interest in its stock, although practically all holders entered into an agreement with that company to sell 60 per cent of the common stock and vendors agreed for fifteen years not to engage in like business, but no transfer was ever made upon the books; a separate organization has been preserved; no agreement with The American Tobacco Company not to compete has been made, and it has not been used as an instrument for crippling competitors.

The American Tobacco Company waged against defendant fierce, unwarranted competition for the

purpose of crippling or destroying its business and in 1903 set on foot negotiations to acquire the same; and because of such competition and the fear of destruction defendant's stockholders agreed to convey a controlling interest to that company which thereafter, contrary to the understanding, attempted to control and dominate its affairs and to use it to break down and destroy others for the purpose of destroying competition and acquiring a monopoly (R. I, 270–271). The result was a suit, still pending, to rescind the agreement and restore the stock to original holders. [This company has not appealed, and in open court expressed its approval of the decree below.—R. I, 334.]

ANSWER OF THE IMPERIAL TOBACCO COMPANY (R. I, 174–183).

This admits incorporation and organization under the laws of Great Britain, capital 18,000,000 pounds sterling, bonded indebtedness 2,065,000 pounds; that defendant is engaged in carrying on business in Virginia and other States; that for a long time many separate competing concerns with plants in Great Britain bought leaf tobacco, converted the same in the United Kingdom into products for consumption and sold and distributed them there and shipped them to the United States and throughout the world; that many of these concerns were old, well established, and possessed large assets and world-wide reputations (R. I, 175); that in 1901 The American Tobacco Company purchased Ogden's, Limited, of

Liverpool, and through it endeavored to sell and distribute its manufactured goods, the result being a trade conflict between it and English manufacturers, many of the leading and strongest of which combined in order to protect their interests. That defendant was incorporated in 1901, and in exchange for stock received conveyances of the business and plants of leading English concerns which, together with subsequent acquisitions, are operated and conducted by it; that during 1901 and 1902 there was commercial conflict in the United Kingdom between the American companies and defendant; that the written agreements of September, 1902, attached as exhibits to the petition, were executed in Great Britain and have been observed.

This defendant denies any conspiracy with any other defendant, any agreement in restraint of trade and commerce among the several States or with foreign nations, and any attempt to monopolize any part of such trade. And it asserts that the English contracts of September, 1902, were entered into without purpose of restraining trade or commerce in the United States or between the United States and Great Britain, and to protect it from serious competition in the latter country in the business of manufacturing and selling, to which commerce no legislation of the United States has application. The validity of the agreements depends upon the law of England, where they were executed (there is no statement of the law of England); that in September, 1902, the export business of manufactured tobacco

from the United States to Great Britain was small compared with the total business in that Kingdom, and like export business from Great Britain to the United States was small compared with the total, because of high duties, etc.; that the agreements were not entered into with the view of restraining trade and commerce between the United States and Great Britain, since the exports at that time were not sufficiently large to induce such action, and so far as there was intent to reduce competition between the parties it was that existing in Great Britain. The written agreements relating to the British-American Tobacco Company, Limited, did not operate in restraint of interstate or foreign trade or commerce within the meaning of the antitrust act; but so far as they attempted to restrain the export of manufactured products from the United States to foreign countries other than Great Britain, such restraints resulted from covenants based on *bona fide* sales of the export business of The American Tobacco Company and of the Imperial Tobacco Company and others; that defendant is a corporation under the laws of England, with principal place of business in Bristol, almost all whose stock is held by British subjects; that its business is principally carried on within the United Kingdom; that the written agreements were all entered into there; and that neither the antitrust act nor any other act of Congress can have application to defendant, its directors, officers, agents, or to said agreements.

ANSWER OF THE BRITISH-AMERICAN TOBACCO COMPANY (R. I, 198–203).

This consists largely of general denials. It admits the contract of September, 1902, but says this was entered into in England to be construed and take effect as a contract of that country where it was legal and valid, and, further, that valuable consideration was given for the businesses and assets acquired. Defendant denies that it was created as an instrument for the special purpose of defeating the laws of the United States or that it has done anything in violation thereof; but admits that its requirements of leaf tobacco are purchased by The American Tobacco Company in the United States under an arrangement between them and that it owns stock of sundry companies which manufacture, sell, and distribute tobacco throughout the world.

XII.

Concerning the evidence—especially that relating to controverted matters.

The answers and written admissions establish the organization, business, capitalization, and stock ownership amongst defendants and others, together with purchases, conveyances, restrictive covenants, consolidations, execution and observance of the English agreements of 1902, and financial results obtained—all substantially as set forth in the petition. It is therefore unnecessary to recite with particularity the evidence on these points. The summary of the petition *ante* gives the essential facts.

The record discloses how competitors in commerce have been systematically brought under one control, and dominion of markets obtained. The principal witnesses introduced by the Government were interested in defendant corporations and were called because acquainted with the inside facts. Their hostile position, natural bias, and manifest disposition must be considered. They could not be relied on for accurate information in response to general questions. The Government consequently introduced a great number of their letters, which clearly reveal specific acts and purposes.

The testimony of struggling independent manufacturers appeared nonessential, and to subject them to probable inquisitions concerning their private affairs unwise. An illustration of defendants' attitude towards witnesses is presented in the cross-examination of Hillman, a New York merchant (R. III, 485–507), called to explain the destruction of tobacco jobbing there occasioned by the exclusive selling agency which defendants gave Metropolitan Tobacco Company. The evidence was taken before an examiner with very restricted powers.

The number of defendants, the multitude of transactions, and a record of reasonable size required the Government to limit its evidence to important, characteristic matters adequate to support the essential allegations—the endless details would have consumed much time and obscured real issues.

The facts concerning some characteristic transactions were brought out in order to show the falseness of defendants' claim that competition existed among them; their power; their actual wicked, unlawful intent; their practice of unfair methods; and their use of combined power to oppress and destroy. To this end much correspondence was introduced concerning the operations of companies secretly controlled but held out as independent.

The Government has proved how commerce in tobacco leaf and products developed under free competition; the organization of The American Tobacco Company in 1890 for manufacturing and trading with $25,000,000 capital—greatly inflated—to take over the leading cigarette makers and monopolize that business; and how, pursuing a fixed purpose to destroy competition, dominate, control and monopolize, its capital stock was increased; its connection, power and operations extended by attacking and acquiring competitors, by buying or consolidating competing interests, by securing control of corporations, etc., until the combination's annual demand for leaf increased from 15,000,000 to 450,000,000 pounds and practical monopoly of the trade has been secured. The associates are now everywhere dominant factors in the tobacco trade, with no competition amongst them, and with full power to control prices of raw products and manufactures and to prevent the probable success of any one who may want to compete.

The purpose to destroy competition, to expel those in business, deter others from entering and to monopolize is a necessary inference from defendants' uniform course; but specific acts were proven, e. g., the use of secretly controlled corporations, selling goods below cost, controlling the avenues of distribution, etc. Likewise, their power necessarily appears from the established conditions; but illustrations of its exercise have been presented, e. g., the concerted action of New England jobbers in refusing to handle independent goods; the concentration of tobacco jobbing in New York City in one company; terrific competition against the Nashville Tobacco Works and the Richardson Company in order to destroy or purchase them, etc.

The question of prices for tobacco products was not entered upon. It seemed irrelevant, however important from an economic standpoint. But this has been carefully investigated by the Bureau of Corporations and the results are in its report of June 5, 1909, to the Senate. The "Trust" has materially advanced prices. Tables from the report are Appendixes "N" to "Q" hereto.

For like reasons, little evidence was introduced concerning prices of leaf. But the record shows that demand has steadily increased while the supply has decreased; that prices dropped below cost of production immediately after the combination of 1902 between the Imperial and American companies; and that the value of fancy grades, nearly all of which are bought by the "Trust," have declined, while less expensive

ones, for which some competition still exists, have materially advanced. The decreasing supply, larger demand, greater cost of land and labor, and well-known, concerted, energetic efforts of the farmers to protect themselves sufficiently account for any advance. The destruction of competition and ever-increasing purchases certainly enable defendants unduly to influence the markets.

The individual defendants—officers, agents, and directors of the corporations—control the combination's complicated affairs. James B. Duke has been the central figure from the beginning, and the present situation is due largely to his masterful manipulations.

The answers, admissions and testimony support every essential allegation. As above pointed out, no substantial dispute exists concerning the great mass of specific facts set forth in the petition. But defendants do emphatically controvert all allegations concerning unlawful intent, power to control and effect of their action on commerce. They also assert that their purchases were for investment; that competition has not been improperly destroyed; that they have no power to destroy it; that they have no monopoly; that they have not acted oppressively or wickedly or practiced unfair trade methods; and that their course has not been characterized by intent to destroy competition or gain monopoly.

The groundlessness of these denials and assertions when not otherwise apparent is shown by some portions of the evidence especially referred to below, with

citations. To collect all would unduly extend this brief; an examination of the record is essential to complete understanding of the complicated situation.

TRADE AND COMMERCE IN TOBACCO AND RELATED PRODUCTS PRIOR TO 1890.

The methods of independent concerns trading in tobacco, etc., prior to 1890, described in the petition (R. I, 12–15) are not controverted. Witness Dula (R. II, 447, 448) testifies that "brands" began to be general some time prior to 1880, and explains other developments; also how leaf was formerly obtained and manufactured products disposed of. F. S. Kinney (R. II, 530 *et seq.*); R. K. Smith (R. II, 156 *et seq.*); Cobb (R. III, 1, 50); Yuille (R. II, 89), and Carlton (R. IV, 229) gave similar testimony.

Formerly leaf tobacco was sold at many independent competing warehouses. The purchasing power of defendants has forced unification of these and enables them to dominate the business (Dunkerson, R. IV, 93–97).

Long well established "Brands" are "just like bread" (Harris, R. III, 569) and jobbers "have got to handle them" (Letts, R. IV, 467). The method of advertising them, without reference to the manufacturer, is illustrated by Exhibits 68 and 69 (R. V, 507). Exhibits 62 and 63 (R. V, 488) give the enormous consumption of defendants' leading brands, with their originators; and Exhibits 64 and 65 (R. V, 489–505) the great number which they manufactuer and sell at all kinds of prices.

ORGANIZATION OF ORIGINAL AMERICAN TOBACCO COMPANY IN 1890—ITS PURPOSES—ACQUISITIONS—AND EXTENSION OF BUSINESS.

In 1885, W. Duke, Sons & Company was incorporated in North Carolina to manufacture and trade in cigarettes and smoking tobacco, with $250,000 capital, then the fair value of the assets; and between it and four other concerns—Allen & Ginter, Richmond, Va.; Kinney Tobacco Company, of New York; W. S. Kimball & Company, of Rochester, New York; and Goodwin & Company, of Brooklyn, New York, there was fierce competition here and abroad during the five succeeding years (Duke, R. IV, 334–337). In January, 1890, after protracted negotiations, the parties controlling these interests incorporated The American Tobacco Company in New Jersey and became its officers and directors—J. B. Duke then and ever since president. By agreement the entire $25,000,000 capital was apportioned amongst them—Duke, Sons & Co., the largest, receiving $7,500,000—and the assets, good will, etc., of all were conveyed to the corporation, but without covenants against competition (Kinney, R. II, 530–536; Duke, R. IV, 337). In this way the company at once secured a monopoly (95 per cent) of the cigarette business, and began to make large profits. Its charter provided (R. V, 34)—

> The objects for which the company is formed are to cure leaf tobacco, and to buy, manufacture, and sell tobacco, in all its forms, and to establish factories, agencies, and depots

for the sale and distribution thereof, and to transport or cause the same to be transported as an article of commerce, and to do all things incidental to the business of trading and manufacturing aforesaid.

(This was amended April 20th, 1901, by adding the following words: "To indorse or otherwise guarantee the principal or interest, or both, of and on any bonds, debentures or promissory notes that may be made, issued, or uttered by any corporation in which said company has a substantial interest as stockholder, provided that authority for such endorsement or guarantee be first obtained from the board of directors by resolution having the favorable vote of at least two-thirds of the whole board.")

The portion of the business of said company which is to be carried on out of said State is to cure leaf tobacco, and to buy, manufacture and sell tobacco in all its forms, to establish factories, agencies and depots for the sale and distribution thereof, and to transport the same as an article of commerce, and to do all other things incidental to the business of the company which must necessarily be transacted out of said State. The company proposes to carry on its operations in all the other States and Territories in the United States, and in Canada and in Great Britain, and in all foreign countries.

Shortly after the combination, the Goodwin & Company factory was closed and the directors ordered "that the manufacture of all tobacco cigar-

ettes be concentrated at Richmond." (Minutes, Ex. 39, R. V, 191–192.)

Since 1891 The American Tobacco Company, its subsidiaries and associates, have persistently acquired for cash or stock the property, plants, business, and controlling shares of many competitors in interstate and foreign commerce, taking from owners, stockholders, and others stipulations against future competition; and they have also acquired the leading popular brands and secured a rapidly increasing portion of the entire trade (Ex. 77 *et seq.*, R. V). Its capital was increased July, 1891, from $25,000,000 to $35,000,000—$14,000,000 preferred and $21,000,000 common; March, 1899, to $70,000,000—$14,000,000 preferred and $56,000,000 common (Ex. XI, R. V, 38); and in April, 1901, a charter amendment gave power to indorse and guarantee securities (Ex. XI, R. V, 34, 35). Exhibits 32, 33–37 (R. V, 132, 137–185) illustrate the often-adopted procedure of organizing a controlled company in New Jersey to take over a competing business, with restrictive covenants from the vendors (R. V, 114 *et seq.*).

The purchase and dissolution of the Union Tobacco Company in 1899 is a striking example of smothering competition. That company was organized in 1899, with William H. Butler at its head, and Ryan, Whitney, Brady, Elkins, Widener, and others interested. It appeared formidable and was accordingly bought and buried by The American Tobacco Company (minutes relating to transaction appear in Ex. 39, R. V, 199, 200). Butler says (R. III, 405, 406) it

operated six or eight months and had a small business; that he put no money in, but took out $500,000. According to Defendant Duke (R. IV, 367, 375), the purpose was not to suppress competition, but to enlist "that crowd" of financiers, those interested in The American Tobacco Company not being sufficiently strong. As the latter company had just declared a dividend of 100 per cent in stock (Ex. 39, R. V, 201) and 6 per cent in cash, surely no assistance was needed for legitimate purposes.

CONTINENTAL TOBACCO COMPANY—THE PLUG COMBINATION.

Prior to 1898 The American Tobacco Company and others were fiercely competing in the manufacture and sale of plug tobacco. In 1893 it sought to combine these interests (R. V, 192), but failed, and thereafter its plug business was conducted with heavy loss—in 1895, $892,687; 1896, $1,378,345; 1897, $889,730; 1898, $926,302 (see Report, Bureau of Corporations on "Prices of Tobacco," June 5, 1909, p. 35; for minutes showing large losses, see Ex. 39, R. V, 192, 193).

In 1898, after long negotiations, The American Company and certain leading plug competitors (specified in Pet., R. I, 30, *ante*, p. 132) with plants in Missouri, New Jersey, Ohio, Kentucky, Michigan, and Virginia (Ray, R. II, 86–88; Smith, R. II, 166; Dula, R. II, 453–455), organized in New Jersey the Continental Tobacco Company for "trading and manufacturing," with $75,000,000 capital—after-

wards $100,000,000—half common, half preferred (Ex. 12, R. V, 39). As agreed in advance they apportioned the shares amongst them, immediately conveyed their plug business and connected properties to the new company, with covenants against competition, and the owners and officers of the old concerns became its stockholders, officers, and directors—James B. Duke, president. The charter provided (R. V, 39)—

> The objects for which this corporation is formed are to cure leaf tobacco, and to buy, manufacture, and sell tobacco in any and all its forms, and to erect, or otherwise acquire factories and buildings, establish, maintain and operate factories, warehouses, agencies, and depots for the storing, preparation, cure, and manufacture of its tobacco and for its sale and distribution, and to transport or cause the same to be transported, as an article of commerce, and to do any and all things incidental to the business of trading and manufacturing aforesaid. To endorse or otherwise guarantee the principal or interest, or both, of and on any bonds, debentures or promissory notes that may be made, issued or uttered by any corporation in which said company has a substantial interest as stockholder, provided that authority for such endorsement or guarantee be first obtained from the board of directors by resolution having the favorable vote of at least two-thirds of the whole board.
>
> This corporation shall also have power to conduct its business or any portion of it in all

other States and Territories, colonies and dependencies of the United States of America and in Great Britain and Canada and all other foreign countries, to have one or more offices out of the State of New Jersey, and to hold, purchase, lease, mortgage, and convey real and personal property out of the State of New Jersey as well as in said State.

The Continental and American companies were operated with the same general purpose, the former being confined principally to plug, the latter to other departments of the trade (Harris, R. II, 16; Duke, R. IV, 366). Both actively acquired competitors (for list see Pet., R. I, 34–38, *ante*, p. 134) and rapidly increased their power. The Continental purchased leaf for the plants which had previously maintained independent buyers (Smith, R. II, 164, 168–171) and sold the combined output.

The manipulations attending the combination through the Continental produced some striking results. Prior to 1898 the plug business of The American Company entailed heavy losses—during 1898—$840,000 (Ex. 39, R. V, 233). Nevertheless, for this with plants, assets, etc., connected therewith, the Continental exchanged $30,000,000 of its stock, and in addition paid the $840,000 loss (Ex. 39, R. V, 196, 197; Duke R. IV, 350, 353, 357). The American Company was treated as though it had made a profit, and having promptly increased its authorized capital from $35,000,000 to $70,000,000, declared a stock dividend of 100 per cent on the common stock—$21,000,000 (Ex. 39, R. V, 201).

Competition between the Continental and its strongest competitor, the Liggett & Myers Company, at St. Louis, was destroyed in 1899 by the manipulations of James B. Duke and others, and the former acquired the latter's business and assets, together with $5,000,000 cash, by issuing therefor $35,000,000 stock (Dickerman, R. III, 393, 394; George P. Butler, R. III, 574, 575; J. B. Duke, R. IV, 361–363).

CONLEY FOIL COMPANY—TIN-FOIL MONOPOLY.

In December, 1899, the American Tobacco Company procured the incorporation of the Conley Foil Company, a controlled company, in New Jersey, with $250,000 capital (afterwards $375,000 and $825,000), for "trading and manufacturing" (see Charter, R. V, 69), and this in exchange for stock, with the usual covenants, took over John Conley & Son (partnership), which in 1899 manufactured 4,500,000 pounds of foil (Conley, R. III, 150). It afterwards acquired all shares of the Johnston Tin Foil & Metal Company at St. Louis, a leading competitor (Conley, R. III, 158–161), but long concealed and denied the connection (Conley, R., III, 161, 300). These two now manufacture and distribute annually 16,000,000 pounds of foil—more than two-thirds of the total produced in the United States (Conley, R. III, 157). Of such output defendants purchase at least 70 per cent under contract prices, based on cost of material and yielding good profits (Conley, R. III, 154, 157). Only one important competitor remains, and all opponents

are supposed to make about 6,000,000 pounds yearly (Conley, R. III, 161, 162). The American Company holds $495,000 of the stock (Conley, R. III, 303). Unfair methods are referred to later.

AMERICAN SNUFF COMPANY—SNUFF MONOPOLY.

In March, 1900, under preliminary agreements, parties controlling the concerns to be acquired (Ex. 34, R. V, 148; Helme, R. II, 437, 438) organized the American Snuff Company in New Jersey and became its officers and directors. The $25,000,000 capital stock was apportioned among them (See Charter, Ex. 16, R. V, 57; Helme, R. II, 436; Condon, R. IV, 489, 490), and it immediately took over the snuff business of the American and Continental companies, P. Lorillard Company, the Atlantic Snuff Company, and the George W. Helme Company, the leading snuff producers, with covenants against competition. The agreements are Exhibit 34 (R. V, 148–164). The Snuff Company at once began to acquire business and plants of competitors, taking the usual covenants (Helme, R. II, 442) and continued until no formidable one remains. The answer (R. I, 263) mentions one survivor—the Byfield Snuff Company—which produces 160,000 pounds annually and operates in New England (Choate, R. IV, 305). In order to eliminate this insignificant competition the American Snuff Company for years has been selling, in that territory exclusively, far below cost (Choate, R. IV, 304–308; Smith, R. III, 189, 190).

The American Tobacco Company in its own name holds 52,822 shares of Snuff Company stock; the P. Lorillard Company, a subsidiary, holds 45,841 shares—together 98,663 shares. This is more than 40 per cent, enough to control, and an actual majority at stockholders' meetings in 1905, 1906, and 1907 (Christian, R. III, 225; Ex. 50, R. V, 427–437). J. B. Duke, president, and four vice-presidents of The American Company are directors of the Snuff Company, and directors of the former are large stock holders in the latter (Ex. 45, 47, R. V, 356, 362). P. J. Maloney, of the Snuff Company, is on the committee in charge of leaf purchases for the combination (Yuille, R. II, 101, 102). The two companies are jointly interested in an insurance scheme in the Amsterdam Supply Company, have their offices in the same building, the same law department; their affairs are so interwoven as to preclude semblance of competition (Christian, R. III, 238).

From its organization in 1900 to July 31, 1907, the Snuff Company purchased 244,578,666 pounds of leaf, and used 162,021,496 pounds, the remainder being turned over to others (Christian, R. III, 224). It pays 10 per cent dividends on common stock, 6 per cent on preferred, and has accumulated a large surplus. It has a dollar of stock for every pound of output (worth 40 cents); and the profits upon actual business are enormous (Ex. 53, R. V, 466-468). For the history of acquisitions by this company, etc., see evidence Otis Smith (R. III, 180–217).

AMERICAN CIGAR COMPANY—CIGAR COMBINATION.

In 1901, by preliminary agreement (see Ex. 35, R. V, 165) parties controlling the American and Continental companies, and Powell, Smith & Company, organized and became officers of the American Cigar Company, of New Jersey (see Charter, Ex. 15, R. V, 52), with $10,000,000 capital (afterwards $20,000,000), which immediately took over the cigar, stogie and tobie business of the three, issuing stock therefor and taking covenants against competition (Ex. 35, R. V, 165; Ex. 39, R. V, 209, 210–211).

Pursuing the general plan, the Cigar Company has acquired, by direct conveyances, etc., or through stock control, the plants and business of competitors in the United States, Cuba, and Porto Rico (for list see Pet., R. I, 76–79). In the two latter countries it owns plantations and is dominant in the cigar, cigarette and tobacco business, foreign and domestic (Cobb, R. III, 16–27, 35, 40, 79). It has an organized department for the purchase of leaf with agents in important markets (R. III, 38); also factories in various States and abroad, whose output it sells and distributes in interstate and foreign commerce (Cobb, R. III, 36–37). Within seven years it has secured 14 per cent of manufacture, trade and commerce in domestic cigars (Exs. 83, 85, R. V.). The American Tobacco Company loans it large sums—aggregating sometimes more than $5,000,000—and it loans to subsidaries (Cobb, R. III, 93).

CONSOLIDATED TOBACCO COMPANY.

The attempt to monopolize the cigar business through the American Cigar Company (1901), to acquire the English trade through Ogdens (1901), and to further extend the monopoly, demanded large capital (Duke, R. IV, 377). In part to provide funds, but especially to secure fixed control of the American and Continental companies by a few men (6), the Consolidated Tobacco Company, a holding corporation, was organized in New Jersey (June, 1901) with $30,000,000 capital (afterwards $40,000,000), perpetual existence and broad powers, to manufacture and trade in tobacco, and to hold and guarantee dividends upon or payment of securities of other companies, etc. (see Charter, Ex. 13, R. V, 45); J. B. Duke became president. A few shares over a majority were taken and held during the company's existence by six men—Anthony N. Brady, J. B. Duke, Oliver H. Payne, Thomas F. Ryan, William C. Whitney, and Peter A. B. Widener (Ex. 49, R. V, 423). Chiefly in exchange for its bonds this company procured nearly all the common stock of the American and Continental companies and controlled both. Defendants Cobb (R. III, 32, 33) and Duke (R. IV, 377) say that it was organized to supply funds to the American and Continental companies, but manifestly their ordinary business demanded no such extraordinary course and selling out control of itself is not the customary way of raising company funds. The plan was used to acquire competitors and extend monopoly (Pet., R. I,

34–37; Ex. 8, R. V, 27). The Consolidated yielded enormous profits until 1904 when it was merged with the American and Continental (Financial Statement, Ex. 52, R. V, 462–465).

UNITED CIGAR STORES COMPANY—RETAIL BRANCH OF COMBINATION.

In May, 1901, the United Cigar Stores Company was incorporated in New Jersey by Whelan and others, with $2,500 paid-up capital (Whelan, R. III, 97–100), to sell and distribute tobacco products at retail; and began a small business. Its working capital having been increased to $52,000 in November negotiations between Whelan and Hill, vice president of the American Company, acting under direction of Duke, resulted in the stock control by the latter, and it has since furnished large sums for the business (Whelan, R. III, 99, 109), issued instructions concerning the opening of stores, and otherwise directed operations (Cobb, R. III, 45–47). Defendant Duke says (R. IV, 415): "I told Mr. Hill to watch that and if they were really going to do anything great in it we should have some control of it." The present paid-up stock is $1,650,000; $600,000 of the $900,000 common, all preferred, $750,000, and $2,850,000 bonds are held by the American (Ex. 8, R. V, 17).

The United Company has established 400 retail stores in the principal cities of New York, New Jersey, Pennsylvania, Ohio, Maryland, District of Columbia, Connecticut, California, Washington, Delaware,

Oregon, Texas, Massachusetts, Rhode Island, Illinois, Minnesota, Michigan, Indiana, Missouri, Wisconsin, Kentucky, and other States (Whelan, R. III, 98). In the city of New York it operates 160 (Whelan, R. III, 98). It buys goods in different States, assembles them in central warehouses, and then distributes them to the retail stores throughout the country; and is actively engaged in interstate commerce (R. III, 107). It has subsidiary companies (see Pet., R. I, 58–60, *ante*, p. 141), promotes and furthers the sale of defendants' products, and obstructs independent goods (Hill, R. III, 130). Whelan (R. III, 122) says concerning purchase of majority stock of the United Company by the American Company: "I thought at the time they did not intend to continue it and bought control of it in order to stop us from doing things that might be an injury to them."

The following is from Hill, vice president of the American (March 7, 1903), to Whelan, president of United Company (R. III, 130, 131)—

> DEAR SIR: My attention has been called to the disposition on the part of some of your employees at certain of your stores to further the sale of goods competing with similar goods of our manufacture.
>
> You will remember that when you undertook your enterprise you distinctly agreed with us that in view of our not antagonizing your proposition you would always further, so far as you possibly could, the sale of our products; in fact, we stated to you that unless this was done we would consider it to our interests to hamper

your enterprise in every way we could, but if you would give our products preference we could not see any reason for interfering with your intention of engaging in a large way in the retail cigar and tobacco business if you thought it a good commercial proposition.

The complaint we make we will be glad to have you take up and correct; not only because it is in accordance with your agreement, but also because we will be obliged to protect our interests as we may see proper, unless our products receive the benefit of the cooperation of your company. [A list of places where "the wrong goods" were recommended follows.]

The United Company is an instrument for acquiring control of the retail trade and further crippling competitors (Schulte, R. III, 464-465). For a long time the stock owned by the American Company was not carried in its name (Whelan, R. III, 101; Hill, R. II, 232), and the connection was stoutly denied. The following was written by Hill (September 29, 1902), ten months after control was acquired (R. II, 232):

Mr. FREDERICK ESTABROOK, *Boston, Mass.*

DEAR SIR: We are hearing a good deal here about the United Cigar Stores Co. opening up in Boston, and I also understand that your firm proposes extending your retail business. I will be very glad if such proves to be the case, as I would be very much pleased if your firm were to become even more influential than it is at present, in a retail way, as a protection against this new company in Boston.

> We have no reason to doubt the good feeling of the United Cigar Stores Co. toward us, but it will be a source of much gratification to us to know that your firm, in which we have every confidence, is in a strong trade position.
>
> *Of course all rumors to the effect that our company is back of the United Cigar Stores Company are entirely without foundation, as we have no financial interest whatever in that company.*
>
> Yours, very truly,
>
> PERCIVAL S. HILL,
> *First Vice President.*

February 20, 1906, Harris, vice president American Company, wrote Whelan (R. III, 520):

> It has just occurred to me that when you get to London you will have to be pretty careful in making payments for what you may buy in such a way as not to admit of their being traced to you or the British-American—in other words, instead of having the British-American pay by its own check, have it go to the bank and get what we would call a cashier's draft. You will, of course, see the force of this. * * * The same thing will apply in Germany.

Writing to defendant Duke, November 6, 1902, Hill says of the United Co. (R. III, 127):

> Acting on the advice of our different people here we have instructed these stores not to open up in other localities than those in which they are now located.

This company has bought out dealers with covenants against competition (Whelan, R. III, 99); at

tremendous cost has set up prominent retail stores in large cities; and supported by the confederates is seeking to control the retail trade (Schulte, R. III, 462, 466–467). It has a decided advantage over other retailers in being permitted to purchase the goods of the allied companies at wholesale prices (Hill, R. II, 237) and in being supported by their enormous financial strength. So important are its real estate operations that a separate company has been organized therefor—the United Merchants Realty and Improvement Company—and financial aid when necessary is given this by other defendants (Whelan, R. III, 105, 106; Hill, R. II, 350, 351). For explanation of the inevitable results and the effect already on the retail trade, see evidence of Schulte (R. III, 462).

MAC ANDREWS & FORBES COMPANY—LICORICE MONOPOLY.

The purchases and combinations of interests through which the MacAndrews & Forbes Company secured control of 95 per cent of manufacture, trade, and commerce in licorice roots and products are specified in the petition and not substantially controverted (Pet., R. I, 61–65, *ante*, p. 145; see also Answer, R. I, 227, and Admissions, R. V, 19–20).

The explanation by defendant Duke for secretly organizing this business is enlightening (R. IV, 410). "There were two or three of these fellows [manufacturers of licorice] and they could have ruined us if they wanted to and we didn't let the people around the

office know about it, only a few of them." The present ability of the Licorice Company to ruin a competitor of the American Tobacco Company certainly seems no less evident!

The company was incorporated (1902) in New Jersey, under direction of Continental Company, with broad powers, perpetual existence and share capital of $7,000,000—$3,000,000 common and $4,000,000 preferred, the latter without voting power (see Charter, Ex. 17, R. V, 63). The common and most preferred shares have been held by Continental Company or its successor (Jungbluth, R. III, 329, 330, 335). Shortly after incorporation, the MacAndrews & Forbes Company, J. S. Young Company, of Baltimore (secretly controlled by the former—R. III, 342) and John D. Lewis, of Providence, R. I., the three principal producers of licorice products, under specific direction of defe dant Duke (R. III, 351) entered into an agreement to establish and maintain prices and advanced licorice paste from 7½ to 10 cents per pound (Jungbluth, R. III, 344, 350; Exs. 26, 27, 28, R. V, 99, 103, 105). The corporations were indicted and convicted under the Sherman Act (Jungbluth, R. III, 350, 351). [A writ of error to this court was dismissed at the last term without hearing.]

MacAndrews & Forbes manufactures exceeding 95 per cent of domestic licorice products (Jungbluth, R. III, 314) and imports a larger percentage of the raw material. About 82 per cent is sold to the allied companies. It supplies 80 per cent of the paste consumed

in Canada—about one-half from factories in this country (Jungbluth, R. III, 315); produces from 75 to 80 per cent of the world's output (Jungbluth, R. III, 318), and maintains factories in Asia Minor and Southern Russia (Jungbluth, R. III., 316, 318). Its foreign financial operations are conducted through the British-American Company (Jungbluth, R. III, 329) and The American loans it large sums—$5,000,000 to $6,000,000 annually (Jungbluth, R. III, 329). Six per cent dividends on preferred stock have always been paid; since 1903, 15 per cent on the common (Jungbluth, R. III, 309, 310); and assets have rapidly increased (see Ex. 60, R. V, 483). Its domestic output of paste for 1907 was 42,282,308 pounds (Jungbluth, R. III, 353). Instances of unfair trade methods are given later.

The origin and development of this world-wide monopoly is well explained by witness Jungbluth (R. III, 308); and he points out plainly how competitive buying of a raw product tends to increase the price and the consequent reasons for eliminating all competitors (R. III, 373; see also Ans. American Tobacco Co., R. I, 228–9). The usual method of retiring experienced men from the business has been followed (R. III, 330).

Speaking of his instructions concerning combination with Young and Lewis, etc., witness Jungbluth said (R. III, 373, 374, 376, 391)—

> * * * (373) I also told him [Duke] that the licorice root collections could not be increased at all as long as we had competition

in the root field. Then the competition or competitors were discussed, and Mr. Duke suggested that the best way to reach the aim of increasing our root supply would be to buy up the competition in this country, Young and Lewis, and in that way the arrangements made at that time with Young and Lewis were originated. * * *

(374) Q. You mean obtain root at a lower price than those competitors or an increased stock without increasing the price? A. At a lower price than could be obtained under competition, as I mentioned before, the production of licorice root being barely equal to the requirements of licorice paste as a product, any sort of competition would have a material effect on the cost of licorice root in a given section. * * *

(376) Q. And what induces MacAndrews & Forbes to furnish this root to these other licorice paste manufacturers? A. The inducement is to keep their competition out of the root field. While our competitors on this side are comparatively small, even small requirements such as theirs would be quite sufficient to increase the price of licorice root in a given section, according to use, how far the competition would drive it. * * *

(391) Q. What is the effect, Mr. Jungbluth, speaking generally, of course, from your knowledge of business where there are many competitors in the field seeking to buy the crude product necessary for manufacture, is the tendency to increase or decrease prices? A. The tendency is ordinarily to increase the price. * * *

Defendant Duke thus explains the occasion and purpose of the combination—the licorice interests. Referring to his conversation with the president of the Licorice Company concerning supplies of root, he testified (R. IV, 411)—

> * * * He said he was being troubled very much by Young who was having his root gathered by the same people that gathered root for MacAndrews & Forbes, and that he was bidding for one root and putting up the price and if he couldn't be stopped we might get the price of root doubled without getting any more root, and I forget whether he advised or I suggested that he should buy Young, and he did buy him, or bought an interest in his concern, and we agreed to get the root and supply Young with it; and I believe at the same time he said Lewis was buying consignments of root received here and that disturbed him, and I said, buy Lewis too. He didn't buy Lewis because Lewis had his licorice plant mixed up with his dyeing works, and I said buy his output then, and he did.

ENGLISH COMPANIES AND AGREEMENTS.

November, 1900, The American Tobacco Company determined to enlarge its trade in the United Kingdom, "although it is not the expectation of the board that such venture will be immediately profitable" (Ex. 39, R. V, 208). To facilitate this, in September, 1901, for $5,347,000, it purchased Ogden's (Limited), a manufacturing company at Liverpool (Harris, R. II, 50). A fierce conflict followed with English mak-

ers; many of them with trade throughout the world combined in the Imperial Tobacco Company, incorporated in 1901, with 15,000,000 pounds sterling capital (afterwards 18,000,000); and this continued the fight (Ex. 29, R. V, 106; Harris, R. III, 430; Ans. Imperial Tob. Co., R. I, 174; Carlton, R. IV, 299). Each combination offered a large bonus to dealers (Ex. 39, R. V, 216); and the American suffered heavy losses (Ex. 39, R. V, 216, 217, 218). The Imperial during this time was and its predecessors had been engaged in importing tobacco products from England into the United States (Harris, II, 22, 24). September 27, 1902, the conflict was ended by contracts executed in London (Exs. 1, 2, 3, 4, R. I, 111–138); and the American Company received 2,700,000 pounds stock in the Imperial, three-fourths of which it subsequently sold at a material advance (R. II, 56).

The Imperial maintains an agency in the United States which purchases in various States half of total leaf exported to Great Britain (Carlton, R. IV, 237; Harris, R. II, 50, 51; Commerce & Navigation of U. S., 1906, p. 749). A strong but unsuccessful effort has been made to establish the existence of real competition between it and the American companies.

Immediately after the agreements of September, 1902, the prices of tobacco leaf suffered a violent decline, going below cost of production (the markets in the Carolinas open in August)—(Carlton, R. IV, 269, 301, 302). The American Company, as stockholder of the Imperial, claims the right to know its

affairs (Harris, R. II, 17), and selects three directors (J. B. Duke is one). The companies do not compete in sales, and jointly own the British-American Company, a large consumer of leaf. The relations are not compatible with genuine competition, and its nonexistence is plainly indicated by correspondence in the record. On one occasion—*e. g.*, the Imperial Company complained of The American because forced to pay too high for certain leaf, and explanations were offered (Harris, R. III, 518, 520, 541, 542). The original letter from the Imperial was never produced, notwithstanding repeated demands (R. III, 676–679). Letters relating to information concerning intentions, agreed percentages of leaf purchases, etc., do not harmonize with the theory of genuine competition (Carlton, R. IV, 255, 256, 257, 258, 286). The inevitable result is indicated by arrangements under which The American Company has purchased perique and Turkish tobaccos for the Imperial (Carlton, R. IV, 246, 247; Ex. 6, R. I, 144; Harris, R. II, 51, 52).

Probably nothing in writing specifically provides against competition in leaf purchases. That is not necessary and might produce unpleasant results; a nod is sufficient. The denials of witnesses who say fierce competition exists between companies, one of which holds stock control of the other, receives constant detailed reports of its operation, and is in frequent intimate consultation with it, are not very persuasive.

Many results of the 1902 contracts have been shown. The Imperial will only sell in the United States to the American companies, and importations have de-

creased (Com. & Navig. of U. S., 1906, pp. 337, 338). It is denied the right to sell leaf, stems, or tobacco extracts here or out of Great Britain and Ireland without consent of and accounting to British-American Tobacco Company for the profits (Hill, R. III, 140, 141; Harris, R. III, 446, 537, 538). Defendants manufacturing here can not export without the consent of and accounting to British-American Company. Each has its own portion of the globe where no other may interfere (Harris, R. III, 438, 444, 446, 449, 566–568, 572–574).

Motive for the English agreements is well expressed in letter, August 6, 1902, from Harris, vice president American Company, to Cobb, another officer (R. III, 433, 434—

> I regret to tell you that the Imperial Co. has stolen a march on us in Shanghai by buying up the American Cigarette Co. of Shanghai right under our noses; in fact, after Roberts and Fiske had entered into some kind of an agreement to purchase and the calling of meetings of the shareholders for that purpose; * * * I am more chagrined over this than anything that has occurred in years, for now, instead of having to deal with a broken-down concern like the old company was, we shall have an aggressive competitor right on the ground, who though not having any trade in China as yet will undoubtedly pursue the same policy as in India, namely, to produce the cheapest kind of goods and sell them at the cheapest kind of prices, thereby putting a very effective check on our progress with

> "Pin Head's" and Murai's goods. Right along with this comes the delay in Cuba in connection with the J. S. Murias concern and notwithstanding all our cabling up to the moment we have received nothing indicating that the contract has been signed, it had been put off from day to day without any satisfactory reasons, and ever since the Shanghai performance the possibility has dawned upon us of another coup being made by the Imperial Co. in Cuba. Their success would mean a great handicap to us in Great Britain particularly, for with the present flourishing condition of the J. S. Murias business there and an aggressive policy on the part of the Imperial Company *it would mean a severe check to our freedom in regulating prices on our Havana cigars.*

One reason for buying a competitor is likewise well explained by Harris (R. III, 448)—

> Usually there is present an incentive which seems to be absent in this case, namely, that the prices of a competitor though on a small output, placed somewhat below our prices, prove an insuperable obstacle to our lifting our prices to a legitimate basis on a tremendous output, so that what we save in eliminating the cost of fighting, and what is gained in the advancement of prices is a potent incentive towards making a deal.

January 13, 1905, Hill, vice president of the American, wrote the Imperial, called attention to the contract of 1902, defining territory, complained of its violation "by sale by you in the United States of leaf

tobacco, scrap tobacco, and stem products of tobacco," and asked for an accounting (R. III, 140, 141).

December, 1906, Harris, chairman of British-American Company, wrote agreeing that the American and Imperial should be excluded from "leaf dealings" therein and draw their supplies "from the new fields such as Africa, India, China, etc., through the British-American organization on the ground." (R. III, 531, 532.)

In October, 1907, Cunliffe Owen, of the British-American, wrote Harris regarding "an arrangement with the Imperial Tobacco Company by which we permitted them to export stems to our territory, on the understanding that they accounted to us for one-half the net proceeds," and also regarding the British-American Company's part of profit from foreign sales by Kentucky Tobacco Product Company (Harris, R. III, 537, 538). Whenever a subsidiary of the American Tobacco Company exports anything, the latter's proportion of profits must be paid to British-American Company (Harris, R. III, 566, 567); and if the Imperial Company sends stems from England it must likewise account (Harris, R. III, 572, 573).

The British-American Company consented to formation of companies for "export business" as defined in agreement of September, 1902, provided The American Company should report half yearly and pay over the profits. (Harris, R. III, 439, 440.)

In November, 1904, Harris, of The American Company, wrote the British-American Company

giving it permission to operate in the Philippine Islands. (R. III, 441.)

The British-American and its subsidiaries, David Dunlop and T. C. Williams Co. (formerly the most important exporters of plug) make nearly all manufactured tobacco exported from the United States, and with subsidiary W. S. Mathews & Sons, send quantities of leaf abroad. (Harris, R. II, 46–49; Mathews, R. III, 171, 174; Harris, R. III, 418, 419, 420.) American leaf is used almost exclusively in England for tobacco products. (Harris, R. II, 50.) Likewise, for the output of British-American Tobacco Company everywhere (Harris, R. II, 32, 67), 50,000,000 pounds being purchased annually therefor by The American Company (Harris, R. II, 33, 34). Six million pounds goes to England (Harris, R. II, 50, 51) and is used for export trade once carried on by the Imperial and its predecessors. Before the contracts of 1902 this was purchased in competition with the American Company. (Harris, R. II, 76–79.)

Federal statutes authorize bonded factories for tax-free tobacco intended for export. Reports from these are not made directly to the Internal Revenue Bureau and consequently are not included in the figures given in its annual reports, unless expressly so stated. The difference between products exported from bonded warehouses and tobacco made in ordinary factories and sent in bond to port of exportation must be noted. The British-American Company or its subsidiaries manufacture for export in bonded

warehouses in North Carolina and Virginia (Ex. 21, R. V, 77), in 1907, 1,805,117,150 cigarettes and 4,866,419 pounds of plug and twist (Ex. 84, R. V).

Stems and dust of the British-American Company are sold to Kentucky Tobacco Product Company (controlled by the American Company) (Harris, R. III, 416). In August, 1904, Harris wrote to the British-American Company: "It certainly is to the interest of all concerned to see that no competition is allowed to exist in the marketing of the finished product in the various countries abroad between the product of the English factories and those of the Kentucky Tobacco Product Company" (R. III, 439). In March, 1905, The American Company wrote the Imperial complaining of the latter for selling offal in the United States and pointing out its loss by reason of excessive prices paid by a subsidiary: "This fact illustrates the injurious results to us, and to companies in which we are interested, of your trading, as it appears to us, in violation of the contract of September 27, 1902." (R. III, 446.)

THE MERGER OF 1904.

October, 1904, The American, Continental and Consolidated Companies were merged (see Ex. 7, R. I., 150–159). Defendant Duke says this was because of the decision in the Northern Securities case, and also because "we would have a more perfect and compact organization, and as both concerns were practically owned by the same interests I thought it was best to make one concern of it" (R. IV, 379, 429, 430). The common stock, with exclusive

voting power, went to stockholders of the Consolidated Tobacco Company; and Anthony N. Brady, James B. Duke, Oliver H. Payne, Thomas F. Ryan, William C. Whitney, and Peter A. B. Widener (or their representatives) have continued in control of the combination (R. V, 390, *et seq.*).

COMMERCE IN LEAF TOBACCO.

For a long time leaf tobacco was sold by the farmer at the barn or through competing warehouses, and many independent bidders sought it (Smith, R. II, 157–160). After 1890 the number rapidly declined and The American Company and its subsidiaries became purchasers of more than half of the southern crop, with agents, under one general supervision, located in all important districts (Smith, R. II, 172–178; Ex. 76, R. V; Cobb, R. III, 1; Yuille, R. II, 89; Carlton, R. IV, 229, 299). The necessary result is undue power over prices.

Since the formation of the Imperial Company (in 1901) it has been the second largest buyer of American leaf and has maintained an agency with headquarters at Richmond. Through this it purchases in Kentucky, Maryland, Virginia, and the Carolinas about 54,000,000 pounds annually and in addition it buys an undisclosed amount of the cigar type (Carlton, R. IV, 237, 253, 259, 278) through a separate agent who comes to this country, and from dealers in England. When this company, and the American were in real competition (1902), prices in the Carolinas and Vir-

ginia were very high (R. IV, 241, 242, 264, 265, 271) notwithstanding the large crop; when this ceased they fell below cost of production. The average for 1902 was not again reached until 1907, notwithstanding the declining production (R. IV, 269).

The inevitable tendency of the agreement between the English and American combinations is that leaf for both will be purchased through one agency; already the American Company has bought for the Imperial Company perique tobacco in Louisiana (Charlton, R. IV, 277, 278) and leaf in Turkey (Ex. 6, R. I, 144). The record supports the conclusion that since 1902 these companies have worked harmoniously concerning leaf purchases as in other matters—Carlton's testimony and correspondence (R. IV, 229–304). All significant letters can not be quoted in full, but passages from some follow:

Letter to Imperial Co. from its agent in Richmond, December 23, 1902 (R., IV, 242, 243):

> The markets are now all closed for the Christmas holidays and will not reopen until the 5th of January. Pending the arrival of your letter unless there is some very sufficient reason of which I am not aware, it would be a serious mistake to curtail our operations at this stage. The balance of the bright crop still to sell is comparatively small, and for the past few weeks prices have been going down steadily. The A. T. Co., in their anxiety at the early part of the season to prevent us getting supplies, seem to have overbought themselves, and are now practically off the market on all grades in

which we are interested. Take, for instance, our "C. D." grade, for which prices were forced up as high as $13 per 100 pounds during the time of the fight, we are now buying as low as $8, and expect to make a further reduction when the markets reopen.

As the crop now being sold is of very desirable quality, we are not only buying so much cheaper, but the standard of the grades is better.

If we withdrew from the market for the balance of the season, there are two dangers to be borne in mind: First, the speculators who conspired with the A. T. Co. against us during the early stages of the market and paid such enormous prices, even although their stocks may be in Great Britain unsold, would immediately secure further supplies at exceedingly low prices, and would thereby be enabled to average a lower cost for the whole season's shipments to Great Britain. Second, if we withdraw from the market now, the effect on the farmers, and, consequently, next year's crop might be most detrimental. * * * You must also bear in mind that the farmers are now watching closely the action of the Imperial and the A. T. Co. to the exclusion practically of all others, and if we were to drop out of the market now, it might have a very serious effect on next year's planting, as the farmers have started organizations all over the Bright belt to decide on their course for the ensuing year. * * * If we can insure a good planting next year, we think prices will be such as will make the average of the two years of a very reasonable nature. * * *

Letter from its American agent to Imperial, January 26, 1903 (R. IV, 244)—

> Putting aside the possibility of the A. T. Co.'s position being a legal one, they would naturally have felt annoyed, and to have given them the slightest ground for not working amicably regarding the leaf purchases for the future would, I think, have been a fatal mistake.

Letter from its American agent to Imperial, February 2, 1903 (R. IV, 248)—

> But for the action of the A. T. Co. probably prices would be slightly lower than they are on low grade semi's, but our friends seem to think they are as low as they should be, and possibly from their point of view they are right, bearing in mind the desirability of encouraging farmers to grow a big crop next year.

Letter from its American agent to Imperial, August 14, 1903 (R. V, 250)—

> The markets in South Carolina and eastern North Carolina have been opened, and the primings, which are mean and sandy, have sold at exceedingly low prices. Our buyers have not touched them, and the feeling amongst farmers against the A. T. Co. is most bitter. We are just beginning to buy a few of our grades, and indications are that prices will be low and quality fairly good. The color seems to be better than was anticipated. * * *
>
> It is impossible to say whether present prices will continue during the season, but as speculators generally seem to be afraid to operate, it

looks as if prices will be determined practically by A. T. Co. and ourselves. So far, A. T. Co. are acting most conservatively. * * *

Letter from American resident director of Imperial to its secretary, leaf department, September 7, 1903 (R. IV, 252):

A few days ago Mr. Reed met Mr. R. M. C. Glenn, the head buyer of the American Cigar Co., when Mr. Glenn expressed a strong desire that any of our branches requiring Wisconsin, York State, Connecticut, or any other States cigar seed leaf would place their orders with the American Cigar Co., giving full particulars and samples. He promised to supply them on same terms as their own branches. They practically already control the trade, and expect our branches will not support any independent shippers to their disadvantage. * * *

Letter from its American agent to Imperial, September 10, 1903 (R. IV, 254):

Both the A. T. Co. and ourselves, we think, ought to act for the present very conservatively, so as to insure our being able to remain on the markets until the end of the season, because if one or other were to get their requirements filled up before the end of the season the result on the market would be disastrous. Our hope is that both of us will be able to remain steadily on the market, and if it is thought toward the end of the season advisable to raise limits so as to encourage farmers for the ensuing season this could be

done. If, on the other hand, by any chance prices toward the end of the season were lowered, the effect on farmers would be distinctly prejudicial to next year's growing.

Letter from Imperial to its American agent, October 23, 1903 (R. IV, 255):

> I gather from the rest of this article that The American Tobacco Company proposes to support its campaign in Germany by increasing the prices in the Clarksville district, from which the Germans obtain a large part of their supplies. If this is so, I think the A. T. Co. should inform you of their intention, as it may be desirable for us, if a campaign is on foot in Clarksville similar to that in which they engaged last year in Virginia, to keep off that market, and obtain our supplies or part of our supplies on this market, which is at the moment depressed, but which, once the news of the A. T. Co.'s action is known, would probably rise.

Letter from Imperial to head of leaf department American Tobacco Company, November 3, 1903 (R. IV, 256)—

> * * * Referring to our conversation regarding Wilson, beg to say that I have gone closely into this matter also since I came home and have instructed our branch there to discontinue the purchase of our C. C. mark for the present. I think this mark is about the only one that conflicts with yours, but as a matter of fact the purchase of this mark at Wilson last week were only 2,000 lbs. and

total purchases of all our strip grades only 122,000 lbs. This, as you will see, is considerably below 40 per cent of the total sales, which is what we regard as our share of Wilson tobacco. I think had you been in Wilson yourself you would have taken a different view of the state of affairs there, but we are anxious to avoid any possible friction and are quite willing to meet your views in this direction as nearly as we can. * * *

Defendants through various organizations—principally The American Tobacco Company, Imperial Tobacco Company, American Cigar Company, American Snuff Company, and the R. J. Reynolds Tobacco Company—purchase more than half of all domestic leaf and of certain types more than three-fourths; likewise most of the tobacco grown in Porto Rico, and very largely in Cuba and Turkey (R. V, Ex. 76; Cobb, R. III, 17, 27, 41, 42, 80).

The following is from the Yearbook, Department of Agriculture (1908, p. 680)—

Year.	Acreage, production, value, etc., of tobacco in the United States, 1900-1908.					Domestic exports of unmanufactured, fiscal year beginning July 1.	Imports of unmanufactured, fiscal year beginning July 1.
	Acreage.	Average yield per acre.	Production.	Average farm price per pound Dec. 1.	Farm value, Dec. 1.		
	Acres.	*Pounds.*	*Pounds.*	*Cents.*	*Dollars.*	*Pounds.*	*Pounds.*
1900...	1,046,427	778.0	814,345,341	6.6	53,661,132	315,787,782	26,851,253
1901...	1,039,199	788.0	818,953,373	7.1	58,283,108	301,007,365	29,428,837
1902...	1,030,734	797.3	821,823,963	7.0	57,563,510	368,184,084	34,016,956
1903...	1,037,735	786.3	815,972,425	6.8	55,514,627	311,971,831	31,162,638
1904...	806,409	819.0	660,460,739	8.1	53,382,959	334,302,091	33,288,378
1905...	776,112	815.6	633,033,719	8.5	53,519,068	312,227,202	41,125,970
1906...	796,099	857.2	682,428,530	10.0	68,232,647	340,742,864	40,898,807
1907...	820,800	850.5	698,126,000	10.2	71,411,000	330,812,658	35,005,131
1908...	875,425	820.2	718,061,280	10.3	74,130,185	.....	.....

The acreage, production, and value of tobacco for different States are shown in Appendixes "C," "D," and "E," hereto.

The quantity of leaf used for manufacturing smoking and plug tobacco, snuff, cigars, and cigarettes has rapidly and uniformly increased—the total for 1906 exceeded 1900 by one hundred million pounds (Rep. Com. Int. Rev., 1907, p. 126).

American leaf is used almost entirely in England for manufacturing (Harris, R. II, 50). The British-American Company exports from America to England annually six to eight million pounds of leaf and the Imperial Company some fifty-four millions (Harris, R. II, 51; Carlton, R. IV, 237).

Total leaf exports from the United States in pounds were—1902—291,369,700; 1903—357,496,342; 1904—305,382,128; 1905—328,232,009; 1906—302,-333,075; 1907—331,548,309 (Com. & Nav. U. S., 1906, p. 750; *Id.* 1907, p. 766).

Export of leaf in pounds to countries named (Com. & Nav. U. S., 1906, p. 749; 1907, p. 766)—

	1902.	1903.	1904.	1905.	1906.	1907.
France	31,822,220	31,557,215	33,769,536	40,534,487	40,386,440	41,613,280
Italy	29,948,766	37,536,942	28,626,282	30,446,427	34,105,851	37,369,102
Spain	14,542,342	28,792,693	19,649,414	16,848,409	13,669,616	20,013,488
Japan	4,618,433	4,429,591	5,119,688	6,629,017	7,673,285	2,045,998
United Kingdom	98,727,979	125,135,143	89,372,148	101,782,477	97,967,160	116,438,714

Yuille (R. II, 95–99) points out the types of tobacco which are exported. They grow in Southern States and are mainly purchased by the Imperial Company, and agents of France, Italy and Spain—"Regie" countries with tobacco monopolies.

Govt. Ex. 76 (R. V) is a statement of leaf purchased by The American Company and subsidiaries from crops of 1903–4–5, and estimates of total productions by Mr. Yuille, of its leaf department. It is admitted that their demands for 1906 leaf equaled 1905.

The table following made up from Exhibit 76 (R. V) and Government publications (Appendix "C" hereto) shows purchases by the American Company and companies controlled by it. In addition to these the Imperial Tobacco Company purchases and exports to England annually 54,000,000 pounds.

Type.	Total purchases by A. T. Company and subsidiaries.	Total production in U. S. as estimated by Mr. Yuille.
1903 Crop.		
Flue Cured Va., N. C. & S. C.	160,735,651	278,034,777
Dark Virginia	8,416,356	55,061,305
Va. Sun Cured	5,486,749	6,183,915
Burley	123,850,151	194,070,000
Green River	24,892,527	43,010,000
So. Ky. & Up. Cumberland	12,329,482	21,000,000
Dk. West. inc. Hend. Dist.	27,712,705	184,285,000
Seed Leaf	23,997,151	188,500,000
Seed Leaf Cuttings	3,402,702	.....
Maryland (Bot. from Dealers)	1,012,790	23,942,160
E. Ohio Air Cured & Fired	.....	4,278,750
Totals	391,836,264	998,365,907
(Government's Estimate		815,972,425)
1904 Crop.		
Flue Cured Va., N. C. & S. C.	107,707,751	190,813,490
Dark Virginia	12,369,827	57,288,004
Va. Sun Cured	6,833,551	7,298,689
Burley	127,265,494	194,070,000
Green River	12,911,423	33,330,000
So. Ky. & Up. Cumberland	7,573,903	15,000,000
Dk. West. inc. Hend. Dist.	28,671,087	138,920,000
Seed Leaf	22,851,997	178,500,000
Seed Leaf Cuttings	3,113,345	.....
Maryland (Bot. from Dealers)	335,428	22,900,000
E. Ohio Air Cured & Fired	.....	4,025,000
Totals	329,633,806	842,145,183
(Government's Estimate		660,460,739)
1905 Crop.		
Flue Cured Va., N. C. & S. C.	120,895,040	204,515,976
Dark Virginia	15,372,291	54,436,589
Va. Sun Cured	7,437,199	8,140,669
Burley	175,095,096	240,830,000
Green River	18,228,711	30,470,000
So. Ky. & Up. Cumberland	9,897,208	21,000,000
Dk. West. inc. Hend. Dist.	34,908,336	146,500,000
Seed Leaf	31,080,663	190,000,000
Seed Leaf Cuttings	5,117,929	.....
Maryland (Bot. from Dealers)	397,339	20,316,120
E. Ohio Air Cured & Fired	.....	5,135,000
Totals	418,429,812	921,344,354
(Government's Estimate		633,033,719)

[Purchases by Imperial Co. are not included in above.]

Considering Mr. Yuille's excessive estimate, that demand is for types—one can not be substituted for another—and that of the cigar or seed leaf (175,000,000 to 190,000,000 lbs. yearly) they purchase only 30,000,000, defendants' preponderating influence in southern markets is apparent. Enormous purchases gives them practical control of warehousemen (Dunkerson, R. IV, 96–98), and their power over the markets is further emphasized by the quantities they carry. The financial statements (Exs. 51, 51a, R. V, 441, 456) of The American Company for 1906 and 1907 show leaf on hand exceeding $25,000,000; the American Cigar Company at the end of 1906 had nearly $8,000,000; R. J. Reynolds Tobacco Company exceeding $3,500,000, etc. (Fin. Statem's, R. V, 470, 481).

Defendants claim real competition in purchasing leaf between The American Company and controlled concerns having separate buying organizations. But as all report to and take orders from the central organization and are at work to swell its receipts no genuine competition can exist. The buyers of the R. J. Reynolds Tobacco Company, which purchases 30,000,000 pounds per year, until this investigation sent daily to The American Company detailed reports of purchased leaf (R. II, 117). Rivalry between agents of the same master is not competition. Moreover, these companies at different times have bought leaf for each other and for others and have received instructions concerning purchases (R. II, 601; R. III, 224, 227). The Snuff Company, a director of which is on the central leaf committee, has purchased millions

for the French Government, The American Company, and others, and has exported leaf (Christian, R. III, 224, 233). The R. J. Reynolds Company has done likewise. Of course some apparent competition must exist to affect the producer, but conditions preclude any that is effective—one can not compete with himself. The difference between a "bona fide" competitor and a simulated one was clear to Vice President Harris when he wrote concerning the relations between the Snuff Company and W. S. Matthews & Sons (R. III, 444)—

> Be that as it may, it would be suicidal for the Matthews concern not to have the Snuff Company interested in it, for without having a stock interest in it, it would be very risky, to say the least of it, for the Snuff Company to do any purchasing for what is virtually a competitor on the leaf markets. You may have read of the inquiries now being made in the State of Tennessee by directions from Washington into the existing methods of buying leaf tobacco, and we are rather expecting daily that the Snuff Company, the Matthews Company, and others will be called upon to disclose our relationships and buying arrangements. It goes without saying that one of the strong points in defending the Snuff Company purchases for Matthews will be the fact that they have a stock interest in the Matthews concern. Furthermore, I would not like to predict what would happen to the Matthews profits if they should have the Snuff Company as a bona fide competitor for leaf.

See also Dula, R. II, 573, 601; Hill, R. II, 333; Coan, R. III, 624, 625.

GROWTH OF DEFENDANTS—WHAT THEY CONTROL—MANUFACTURED OUTPUT AND BRANDS.

"At the time of the formation of the original American Tobacco Company in 1890 it issued $25,000,000 of capital stock. The tangible assets acquired from the concerns joining the combination amounted to only $3,545,108.02. The difference between the capitalization and the tangible assets, $21,454,891.98, was written down on the books as good will. The company also had, however, $1,825,353.74 of notes given by individuals entering the combination and subsequently paid up. The amount of these notes was treated as a surplus and not balanced by the capital stock. It is entirely evident that, although under competitive conditions, the concerns that entered the combination may have had a considerable amount of actual brand value, or good will, it could not have exceeded a comparatively small fraction of the value assigned to it on the books of the combination. The reason why the American Tobacco Company in its early years was able to earn liberal dividends on its entire capitalization lay in its monopoly power. At the outset the combination controlled substantially 97 per cent of the cigarette business, and it for several years was able to guarantee its position of approximate monopoly by securing a control of all the principal patented cigarette

machines." (Report of Bureau of Corporations to Senate, June 5, 1909, p. 24.)

The combined assets of The American Company and its subsidaries (statements 1907), including the Imperial, now exceeds $400,000,000, all used for one end, and all, except the Imperial's, under the absolute control of six or eight men who hold $20,150,000—a majority of The American Company's common stock. Sixty subsidiary companies are defendants; many others operate in this country and abroad.

When The American Company began (1890), its annual consumption of leaf was under 15,000,000 pounds (Admissions, R. V, 4). The purchases of the allies (including the Imperial) for 1903, 1904, and 1905, respectively, were approximately 441,000,000 375,000,000, and 468,000,000 pounds (Ex. 76, R. V). The record does not show the amount of Cuban and Porto Rican leaf consumed, but it is large.

The output of The American Company for 1890 was 5,466,619 pounds smoking tobacco and 2,453,458,000 cigarettes (Exs. 77 & 78, R. V). The domestic production of manufactured tobacco by it and its subsidiaries (including the British-American) for 1907 was—cigarettes 5,730,623,850 (Exs. 77 & 84, R. V); smoking tobacco, 127,638,531 pounds (Ex. 78, R. V); plug and twist, 142,074,302 pounds (Exs. 79 & 84, R. V); fine cut, 10,115,315 pounds (Ex. 80, R. V); little cigars, 954,001,460 (Ex. 81, R. V); snuff, 22,067,234 pounds (Ex. 82, R. V); cigars, cheroots, and stogies, 1,039,822,996 (Ex. 83, R. V).

The increasing output of domestic tobacco products made by defendants appears in Gov. Exhibits 77 to 83 (R. V). These are summarized in Appendixes "F" to "M" hereto.

The companies operating in Porto Rico in 1907 produced—cigarettes, 362,486,495; cigars, 63,671,162; plug, 13,775 pounds (Ex. 85, R. V); those in Cuba in 1907—cigarettes, 2,084,167,480; cigars, 96,308,255 (Ex. 86, R. V).

The output of the Imperial Company and of the British-American Tobacco Company in foreign countries was not disclosed, but they used therefor about 75,000,000 pounds American leaf.

In addition to tobacco products, subsidiaries of The American Company produced in 1907—40,000,000 pounds licorice paste (R. III, 313, 314); 16,500,000 pounds tin foil (R. III, 157); 450,000,000 cloth containers (R. III, 584); vast quantities of insecticides, fertilizers, etc. (Kentucky Tobacco Products Company); boxes (Mengel Box Company); pipes (Manhattan Briar Pipe Company); and they were also engaged in insurance, sign painting, planting, jobbing, retailing, and purchasing supplies.

The answer says "the creation of a profitable tobacco business depends in the first place on hitting, by luck or skill, upon a process of manufacture, packing, and labeling that will please a great number of consumers; in the second place, bringing this product favorably to the attention of a great many consumers; and in the third place, maintaining the quality and characteristics of this product. * * *

"It has been, and, so far as these defendants believe, always will be, a matter of expense to establish a brand of tobacco of a substantial value, even after the manufacturer has obtained a product which when properly brought to the attention of consumers will be popular. This expense may be incurred in various ways; sometimes expensive advertising is done; sometimes the extensive giving away of samples is resorted to" (R. I, 257, 258, 259).

The tobacco business is largely a "matter of brands" and the more one controls the greater his power to crush opposition and prevent new ventures. To show the great number of brands, covering every grade and price of tobacco products which defendants manufacture, their catalogues or price lists were introduced (see Exs. 64 and 65, R. V, 489–505). There are hundreds of them—of plug chewing alone more than one hundred and fifty.

The popularity of a brand and its consequent importance to dealers is indicated by amount sold; and Exhibits 62 and 63 (R. V, 488) indicate the enormous sales of some which defendants control and their origin. Sales of plug brands "Star" and "Horseshoe" during 1907 were, respectively, 27,322,478 and 19,211,575 pounds; of smoking brands, "Duke's Mixture" and "Bull Durham," 13,784,476 and 11,824,696 pounds.

The dependence of dealers upon defendants and their popular "brands" is forcefully brought out in the cross-examinations of jobbers called by them (R. IV, 464, 473, 529, 544, 610, 620, 622, 630, 640, 703,

709). Also the effective way in which relationship with "secret companies" was concealed and utilized. (See, also, Matthews, R. IV, 189.)

There are some successful manufacturers who have brands, established before defendants became so powerful. To destroy these would be expensive and apparently the better plan is to await events. Block Brothers (R. IV, 550) have a brand 30 years old; Christian Peper, at St. Louis, is an old concern (R. IV, 644); and the same is true of most of those mentioned as competitors in the answer of The American Company (R. I, 262) who are prospering. Scotten-Dillon is exceptional and within a dozen years has built up a large business; but as shown elsewhere, defendants have sought its stock, have succeeded in getting some, and there is no foretelling how soon it, too, may come under dominion.

The position of an old well-established concern is well pointed out by Dula in letter to Patterson, May 26, 1903—

> * * * I also think it important that you should open up negotiations for the purchase of Dill without delay, for I do not believe that anything you might do in the way of fighting his brand on a reasonable basis would have any discernible effect on his output for months to come. It is one of the oldest brands in the country, and its trade is scattered among a class of consumers who are slow to change. The only way to get his business, in my opinion, is to buy it. * * *

NO COMPETITION AMONG PARTIES TO COMBINATION.

The power of The American Company over subsidiaries is not controverted; but it is claimed that except when treated as branches they are managed by minority stockholders and compete vigorously with each other and the common owner. Such a position needs little discussion. This from the answer illustrates defendants' idea of competition (R. I, 220)—

> *The competition between the American Tobacco Company and various other tobacco manufacturing companies is the same whether The American Tobacco Company owns all the stock, a part of the stock, or none of the stock at all,* for these various corporations, except those like Blackwell's Durham Tobacco Company which are in fact only branches of The American Tobacco Company, conducted as separate corporations only for trade method or trademark purposes, have their own leaf-buying plants and their own selling organizations, and it would serve no profitable purpose to anyone, but would be destructive of the tobacco business, to attempt to eliminate or lessen competition. *In truth, the competition between different similar brands of tobacco owned by the same manufacturer is just the same as if there were not such common ownership.*

Defendant Duke testified (R. IV, 394):

> Q. Were any of these acquisitions made in order to thereby get rid of the competition of the concern?

A. No, sir; because we continued to be in competition.

Q. Were any of these acquisitions or majority stock interests acquired with the purpose of using the company against other competitors?

A. No; they were acquired with the idea that we would build up a lot of other organizations. Our crowd had about all they could handle and we concluded that the best way would be if we went into things in that way, was to let them continue an interest in it and they would manage it.

Q. You mean the previous owners would continue the management of it and continue an interest in it?

A. Yes, sir; we wanted them to push and drive hard against us. If they could take our trade, let them have it; we didn't care, or at least I didn't. The manager of a department, he cared; it made him work hard to keep them from getting his trade.

And this by Harris, vice president, relative to Australian matters, is enlightening (R. III, 533):

Our idea is that our Australian friends should arrange matters so as to have *some show of a friendly competition*, which would be the means of establishing a healthier condition of affairs amongst themselves, by each company being imbued with a certain amount of rivalry, while on the other hand it would give the customers an opportunity of buying wherever they chose, which we all know would be

much more palatable than, as they put it, be forced to buy from one concern as now.

Subsidiaries report in detail, directly or indirectly, to The American Company and take directions from it (Schroeder, R. IV, 195–202, 209–212; Hill, R. II, 200, 211, 219, 220, 274, 276, 288, 312, 314, 388, 430; Dula, R. II, 471, 472, 474, 476, 488, 528, 542, 651); its officers and directors are upon their boards; correspondence and conferences continually take place amongst them; they are loaned large sums of money (R. III, 93); some have been directly subsidized; it claims the right to know all concerning a company whose stock it holds (Harris, R. II, 17); and it constantly dictates policy, methods and prices (Dula, R. II, 505, 507, 512, 522, 542, 571, 574–575 *et seq.*).

The affairs of subordinates are conducted in many ways; some have separate buying and selling organizations and transact in their own names under the immediate direction of minority stockholders; others are treated as branches, and their supplies bought and output sold for them (Duke, R. IV, 393–395; Hill, R. II, 212 *et seq.*); but the great purpose of all is to earn money for the American. Defendant Duke, the autocrat of the combination, summed up the situation well when he said: "To the man that is going to run the business I say here go ahead and run it any way you like so you make profits; that is all I care" (R. IV, 395).

A few extracts from scores of letters will sufficiently indicate the real situation—

Vice President Hill wrote Irby, agent at New Orleans, on December 24, 1902, concerning two subsidiaries there (R. II, 256):

> You are no doubt familiar with the agreement made between the Southern and the Louisiana Tobacco companies as to prices. This agreement has been submitted to our counsel, who tells us it is entirely illegal. I wish therefore you would see that said agreement shall be destroyed, and in your presence, by both of these parties. The arrangements they have made can be continued according to the agreement, but no written agreement is necessary. The fact that we wish them to carry out the spirit of this proposition should be sufficient to keep both of these parties in line.

Hill to the Penn Company (a subordinate just acquired), Sept. 24, 1903 (R. II, 272):

> * * * All of our work had been discontinued on Pick Leaf and instructions have been given to-day to discontinue giving gratis on this brand. All of the Blackwell's Durham in competition with your brand has been discontinued. I note your letter from Columbia, South Carolina, which I return herewith. I find this point was omitted in giving instructions as to the sampling of Durham and our representative has been wired to-day to stop it at once. Do not hesitate to call my attention at any time to any localities where work is being done which in any way hampers you.

In May, 1903, George D. Bow, vice president of Nall & Williams Company (a secret concern), wrote Dula (R. II, 524):

> * * * Our mission as we understand it is to get what you do not already possess, and if you do not penalize us with overweight by making us change this brand [Arrowhead] there will be nothing left but yourselves and your-ourselves in the Northwest within the next year. Spear Head is so firmly rooted that we cannot disturb it, but we will so thoroughly clean the board that Claw Hammer will have no nails to pull or Strong Hold no doors to lock. So far as establishing a precedent for the New Comer to follow, *I believe that there will be no more newcomers except of your own creation,* and I cannot help believing that the Continental Tobacco Co. is of the same opinion. To change this tag now and add this hardship to the ones already imposed will make a very much more difficult path for us and really retard us more than *those whose scalp we hope to take* * * *

Hill wrote Heyneman, agent at San Francisco, September, 1903 (R. II, 274): "We want to avoid all useless expenditure of money in competing with our own propositions." And to Carter, of Wells-Whitehead Tobacco Company, Wilson, N. C., in August, 1905 (R. II, 338): "We do not want to get into that fashion, practically competing with each other."

Dula, vice president, in July, 1903 (R. II, 538, 539), wrote Middleton, of Nall & Williams, to change

arrangements in New England because "we practically control the business."

Hill to Woodhouse, wholesaler, at Detroit, secretly receiving salary (August 30, 1904) (R. II, 322):

> It is reported here that in distributing cigarettes, you are filling orders for the Universal Line as well as Surbrug's goods.
>
> Some of our other jobbers of Turkish cigarettes in Detroit decline these orders and are not filling them, feeling that this is due to the Anargyros Company. I think it will be well, if you can see your way clear to take the same position.

And in July, 1903, Hill wrote to Dulaney, president, of Reynolds Tobacco Company, Bristol, Tenn. (a subsidiary) (R. III, 135, 136):

> We hear that your men are doing some active work in Knoxville and vicinity. Our attention has been called to their work by our men who want to work on Duke's Mixture.
>
> We do not understand that there are any brands which have any sale in that locality other than Duke's Mixture and May Queen, and if that is correct, it is not desirable that either of us should go to any expense in that respect.

Craft, of the Craft Tobacco Company (subsidiary) at New Orleans, wrote Hill (R. II, 643):

> My whole idea for the present is to get a certain class who are not using your goods. *I make no effort whatever where I find your goods selling.*

(See also R. II, 274, 275, 338.)

Dula wrote Hamilton of the secret Bland Company October 12, 1903:

> Our retail salesmen are required to give us information each day regarding the movements of our competitors in section of the country worked by you. I will compile and furnish you from time to time such information as relates to Central Union and other products of competitive manufacture whose trade is seemingly influenced by the use of the blue label. * * *

POWER TO CONTROL THE TRADE—INSTANCES OF ITS EXERCISE—EVIL INTENT.

The enormous power of defendants in combination is the inevitable result of admitted conditions, but evidence concerning some instances of its exercise was introduced.

Excluding cigars, they manufacture and distribute more than 75 per cent of all tobacco products consumed in the United States, including most of the popular brands, essential to a successful business; wholesalers and retailers are consequently dependent upon them for indispensable supplies which must be sold on close margin (R. IV, 466). They may select their customers, determine prices, and by allowing greater or less discounts can make or cripple the merchants—they are of much greater importance to him than all others combined. They also, through representatives everywhere, keep close watch on all brands, prices, etc. (R. II, 284). The result is that dealers are subservient, anxious to win favor and larger dis-

counts—a hope shrewdly held out to those who will do as bidden. Vice President Hill (R. IV, 698) calls these specials "confidential allowances" and says: "The trade generally believes such allowances are given, but the names of the jobbers who receive allowances are confidential, and not expected to be known to anyone except the jobber getting it." To be cut off by defendants would probably mean ruin to a dealer's tobacco jobbing department and often highly deleterious to others. For the 250 jobbers specially favored with an extra discount of 2 to 5 per cent for doing "good work," see R. III, 96, and also R. II, 282, 423. When independent wholesalers do not yield, corporations are organized or secured and these do the things desired (Ans. A. T. Co., R. I, 257).

The ability of wholesalers to further sales clearly appears (R. IV, 550, 703); and the ways in which they can obstruct was no mystery to Hill when he wrote directing the action to be taken by one of his 3 per cent "confidential allowance" jobbers in reference to a competitor's goods: "You should see to it that Mr. Deiches puts these goods up in the loft and does not sell them" (R. II, 136).

Wholesale grocers and tobacconists from many sections were called by defendants; 75 per cent or more of their tobacco sales (except cigars) was defendants' goods; and most of them received a "confidential allowance" (R. IV, 460, 469, 526, 542, 559, and others). These discounts are tremendously effective, causing recipients to work for defendants and neglect others; and they have also been used to prevent the handling

of independent goods. Merchants are indisposed to take up independent brands, being in constant fear that the trust will buy them and their labor will be lost (Hillman, R. III, 484).

July 8, 1903, Hill, vice president, wrote to an agent concerning cigarettes made by Butler-Butler Co., then a competitor, but since taken over (R. III, 133):

> Mr. I. T. STEWART, *Rochester, N. Y.*
>
> DEAR SIR: We understand that 15,000 Sovereign cigarettes and 5,000 St. Ledger's were shipped to MM. H. L. Conway & Bro., Rochester, N. Y., yesterday, July 7.
>
> For several reasons we would like to ascertain if this information is correct. I will advise you from time to time as to the different individuals who are receiving these goods in order that you may take such action with reference to our allotment as may cause a discontinuance of the purchase of these goods. It is most important that this matter shall be watched closely and that we recive prompt replies to the memorandums we will send you. This is the first and I expect to send them daily hereafter.
>
> Please regard this letter as strictly confidential and RETURN IT to me. On no account let any one else know you are receiving this information.

July 11, 1903, Hill to Curlett, agent at Baltimore (R. III, 136):

> Following the information contained in my letter to you of July 8. On July 8 there was shipped to J. Josty, jr., 15,000 Sovereign little cigars, 10,000 cigarettes. Wm. Deiches & Co.,

> 15,000 little cigars. You should see to it that Mr. Deiches puts these goods up in the loft and does not sell them. F. A. Davis & Son, 10,000 cigarettes. We did not understand that Mr. Davis was to sell any cigarettes; only little cigars. * * *

Others of the same kind are in the record (see Hill, R. III, 134, 135, 136, 138); they indicate constant spying to ascertain rivals' customers and shipments, and unfair use of power to destroy them.

Hill wrote to O'Sullivan, of Milwaukee, October 14, 1904 (R. II, 326), saying: "Sometimes we are able to secure from a friendly internal-revenue officer monthly the stamp purchases of a particular factory. Perhaps Mr. Leidersdorf can have this gotten for you." Also to Gerow, a "tool" at Detroit, Mich., April 11, 1904 (R. II, 601):

> If it is possible for you to do so, I would like you to ascertain and furnish me with the number of pounds of burley leaf held by other Detroit factories. I would also like to know the average price per pound of such stock, but do not wish to handicap you with this latter item in getting the information, as the most important thing I desire to know is the stock of burley leaf held by other companies. Kindly advise me by return mail what the prospects are for your furnishing me this information.

In 1904, by an extra discount to those handling their goods exclusively, the American and Continental companies caused substantially all established jobbers

in New England to throw out independent products (Harrington, R. IV, 212–228). For this an agent was indicted in Massachusetts and convicted. The appeal to this court was dismissed without a hearing. The record here is Ex. 40 (R. V, 248).

A like offer of an extra 3 per cent discount in June, 1904, induced the jobbers in Philadelphia (67 of the 69) to throw out and refuse to handle independent products (Fowler, R. IV, 320–329). The American Company took up and paid for the goods thrown out (R. II., 249–250).

Jobbers have likewise been controlled through secret salaries and loans (Hill, R. II, 353–355; Dula, R. III., 145–146; Eckstein, R. IV, 538).

In New York City prior to 1899 there were many independent competing tobacco jobbers—at least 125. The American Tobacco Company then encouraged the organization of Metropolitan Tobacco Company and gave it (subject to revocation at will) an exclusive agency (R. III, 256 *et seq.*). The result has been the destruction of independent jobbing and the business there is now monopolized by the Metropolitan Company. Only two jobbers remain who sell as much as $100,000 per year—the largest is $325,000—while the annual sales of the Metropolitan Company have grown to $13,000,000 and there is now no chance to enter the business in opposition to it (Bendheim, R. III, 255–278; Hillman, R. III, 479, 482, 483, 485, 602; Schulte, R. III, 462–467).

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UNFAIR AND OPPRESSIVE METHODS—DURESS AND MALICIOUS INTENT—SECRET COMPANIES.

Prior to 1902 the Standard Snuff Company at Nashville, Tenn., competed with the American Snuff Company. To defeat this, the latter long practiced unfair and oppressive trade methods and the former sued for damages—the record is Ex. 41 (R. V, 307–341). Thereupon the American Snuff Company secretly bought a majority of the Standard stock and operated it under the guise of an independent (Scott, R. IV, 145–165); of course the suit was dismissed.

The Byfield Snuff Company, of Massachusetts, perhaps the most important surviving independent snuff company, has a small business (160,000 pounds annually) in New England, and its principal brand is "Red Top." With intent to destroy this, the American Company in 1904 began and has continued to sell in that territory alone a similar brand at prices far below cost and at a material loss (Choate, R. IV, 304–320; Smith, R. III, 189).

The most profitable business of R. P. Richardson, Jr., & Co., of North Carolina (manufacturers of smoking tobacco), was in Mississippi, where it held a leading position. In 1903, with purpose of destroying this, the American Tobacco Company began aggressively to sell in that State below cost and the Richardson Company was put in well-grounded fear of swift destruction (Stone, R. III, 656–676). At an opportune moment an officer of the American Company approached the stockholders, suggesting an arrangement, and this resulted in a contract for control

by the American Company (Ex. 8, R. V, 21; Richardson Answer, R. I, 265–271). The original owners, charging fraud, are now seeking to annul the arrangement.

For years prior to 1905 the Nashville Tobacco Works, with plant at Nashville, Tenn., did a profitable business, manufacturing and distributing plug in contiguous territory. The American Company instituted a ferocious attack on its leading brand and the owners became convinced that they must either sell out to it or be destroyed. Accordingly, in April, 1906, they secretly sold, and until this suit was brought the company ran under the mask of independence (Puryear, R. IV, 165–181; Dula, R. III, 146, 147). The following from Dula, vice president, to Nall & Williams, of Louisville, a secretly owned "commercial wolf," discloses the scheme (R. II, 545):

> This letter is in regard to the situation around Nashville, Tenn., and the business of the Nashville Tobacco Works. I do not know how familiar you are with that situation, and, desiring to acquaint you with everything I know in regard to it, I will take the chance of telling you all I know, even though it may not be news to you. We began a campaign some six months ago on a brand made by Butler & Bosher, Richmond, called "Bull's Head," against the brand "Old Statesman," made by the Nashville Tobacco Works. "Bull's Head" has become very popular in a short length of time and in many places throughout Tennessee has practically knocked

"Old Statesman" out. Our salesmen have been after me for some time to get out another brand to go against "Nashville Greenville," but, fearing that it might interfere with the work being done on "Bull's Head," I refused to do it.

Our salesmen contend, and I think the contention is well founded, that while "Bull's Head" is cutting into "Old Statesman," the Nashville Tobacco Works' business is holding up as a whole, owing to the increase they are making in the output of "Nashville Greenville." My desire is that you should take up the campaign against "Nashville Greenville," and in order to give you the benefit of anything that we might have I requested my brother to send you the formula for making "Bull's Head," that you might if you deemed it advisable use this formula to run against "Nashville Greenville." "Bull's Head" is made entirely of burley, and I am of the opinion that "Old Statesman" is practically of burley. I further believe that "Nashville Greenville" is made of the throwouts from "Old Statesman." You will remember some time ago I talked to you in regard to getting out a brand of mild "Greenville," and the success of this "Nashville Greenville" convinces me that the idea is correct. I want you to understand that I am not attempting to tell you how this piece of tobacco should be made, but if you can use the information given, all well and good. I am willing to trust to you to get out a piece that will do the trick, but I would like for you to get it out as soon as

you can and enter upon a vigorous campaign, to be kept up until the desired end is accomplished. I think you should use name lists freely in the introduction of your brand, as it is the quickest method I know of getting the tobacco in the mouth of the consumer. We are all very much pleased with your business and the profits you are making, but it is very important that this campaign should be made, even though your profits in making it do not show up very well. Your experience will probably be that if your are successful in getting out a piece of goods that will take from "Nashville Greenville," the same piece can also be used in competition with Strater, Martin, and others.

About 1905, the superintendent of the Conley Foil Company was prosecuted and convicted for attempting to bribe an employee of Lehmaier, Schwartz & Co., its only competitor in New York City, to give information concerning the latter's business (Conley, R. III, 303, 304).

The following letter, dated January 16, 1903, and written by Hill, one vice-president of The American Tobacco Co., to Cobb, another, illustrates how the combination undertook to control commerce (R. II, 256, 257):

MY DEAR Mr. COBB: At Mr. Duke's suggestion, I write you to the effect that a plan has been about decided upon which differs from the one that was being considered before you left, and as in carrying out this plan it will be undesirable to give control of any brands to individuals

in any part of the country, Mr. Duke requests me to write you explaining it so that in case of any of our customers go to Habana you will not promise them control of any special brand. Mr. Rothschild, of the Waldorf-Astoria, will go to Habana to-morrow, Saturday, and we understand he will try to make arrangements to secure other Habana cigars than ours. Mr. Duke's idea is to make a confidential arrangement with the Messrs. Park & Tilford and Acker, Merrall & Condit by which they will sell Habana cigars both to the consumer and the retailer at present cost, so that the retailer will be paying exactly the same price as the consumer. Of course it will be necessary to keep this matter entirely confidential. The result will be a demoralization of the business for such length of time as may be deemed desirable to continue on this basis. The final upshot will be that the importers will be forced into an arrangement by which they will maintain prices agreed upon. This plan is considered the more desirable at this time for the reason that if we try to regulate the profit at the present time it would mean an advance in our goods to both wholesaler and retailer, which would give a decided advantage to independent factories in securing business, but we feel that when our goods are sold to the consumer at present cost there will be no opportunity to get much business for independent factories. Mr. Duke expects to have an interview with MM. Park & Tilford to-day to ascertain if this plan will be carried out by them. Will you kindly extend my regards to Mrs.

Cobb and your daughter, and remember me to all of our folks in Havana, and with sincere regards for yourself, believe me,

Yours, very truly,

PERCIVAL S. HILL.

General objection to trusts and combines hindered sales of products known to be produced by defendants.

The Tobacco Workers' Union has long refused to permit The American Tobacco Company or known subsidiaries to use its label—the Blue Label—which is supposed to facilitate sales, especially where there are many members of the unions (Pinkerton, R. IV, 21–24; Hill, R. II, 271, 276, 283, 507, 572, 624, etc.).

Bushwhacking methods against an opponent are iniquitous in trade as well as war and are inhibited by a civilized conscience. Nevertheless they have been constantly resorted to by the defendants.

Corporations manufacturing and trading in tobacco, secretly acquired, controlled, and operated in the livery of honest independents, were the instruments adopted and long used by defendants to overreach the "union," deceive the public, and dispose of competitors (Fischer, R. IV, 133–137; McAndrews, R. IV, 111–119). How many others were engaged in this nefarious business can only be surmised—twenty, whose names follow, were exposed by the proof:

Nall & Williams Tobacco Company, Louisville, Ky. (plug).

R. A. Patterson Tobacco Co., Richmond, Va. (smoking and plug).

Bland Tobacco Co., Petersburg, Va. (plug).

B. Leidersdorf Co., Milwaukee, Wis.

F. R. Penn Tobacco Co., Reidsville, N. C. (plug and smoking).

Queen City Tobacco Company, Cincinnati, Ohio (scrap).

Day and Night Tobacco Co., Cincinnati, Ohio (scrap).

Craft Tobacco Company, New Orleans, La. (cigarettes).

Michigan Tobacco Company, Detroit, Mich.

Pinkerton Tobacco Company, Zanesville, Ohio (scrap).

Wells-Whitehead Tobacco Co., Wilson, N. C. (cigarettes).

H. N. Martin Tobacco Co., Louisville, Ky. (plug).

Reynolds Tobacco Co., Bristol, Tenn. (smoking).

Manufacturers' Tobacco Co., Louisville, Ky. (plug and smoking).

D. H. Spencer & Sons, Martinsville, Va.

Lipfert-Scales Company, Winston, N. C. (plug).

J. S. Young Company, Baltimore, Md. (licorice).

Johnston Tin Foil & Metal Co., St. Louis, Mo. (tinfoil).

United Cigar Stores Company.

Standard Snuff Company, Nashville, Tenn. (snuff).

Nashville Tobacco Works, Nashville, Tenn. (plug and smoking).

In *Smiley* v. *Kansas*, 196 U. S., 447, this court very plainly pointed out the obnoxiousness of secrecy,

and there seems a want of harmony between its conclusions and the suggestion of the presiding judge below that secret ownership is a matter of no concern (R. I, 294).

The record contains much evidence and a vast deal of correspondence concerning the operations of these "bushwhacking" companies, which disclose amazing depravity and shows with clearness how these sinister agencies were effectively utilized. They were often subsidized by direct payment of two cents per pound of output in order to prevent personal loss to stockholders conducting the clandestine work; and some heavy losses were sustained (R. II, 328, 329, 349, 500, 543, 599, 603, 743; IV, 58. Correspondence was carried on in fictitious names; and unusual addresses were used. Vice-President Dula, *e. g.*, was "D. C. Williams, P. O. Box 70, Madison Square, New York City" (R. II, 524, 526); and Craft "Mrs. Elvina Gustine, Box 1255, No. O, 'Personal,' New Orleans" (R. II, 640). Blank paper and envelopes added to the mystery (R. II, 290; R. III, 300).

The following letter from Dulaney, the manager of one of the secretly controlled companies, to Mr. Hill among other things indicates the dominion of defendants over jobbers (R. II, 316):

> BRISTOL, TENN., *September, 18, 1902.*
>
> DEAR MR. HILL: Your favor of the 16th instant received, with inclosure, which I return herewith. I have just returned from a little western trip looking after our tobacco interests. We have put our forces to work in St. Louis

> again and think we can get some more of the business of "Orphan Boy." I am sending you a list of jobbers who must be made to feel, in some proper way, that it is not offensive to you to handle M. Q. You will know best how to do this.

September 9, 1903, Hill, vice president, writing to Heynemann, his confidential man at San Francisco, about a secret concern just acquired, said (R. II, 271)—

> We have completed arrangements with the Gold Crumb people and it will not now be necessary for us to take any action relative to their product. This is a very confidential proposition and we desire to have it run along without any information or suspicion that we are connected with it in any way. This is absolutely necessary on account of the Union label, as you will readily understand. * * *

Dula wrote Nall & Williams (a particularly vicious concern) March 11, 1903 (R. II, 507)—

> Samples of Arrow Head referred to in your favor of the 8th instant came to hand this morning. I have examined them very carefully and am much pleased both with the appearance and the chew. The filler and sweet certainly both show up well. It is a tough, pleasant chew, and if the people really want a good piece of antitrust, union-made tobacco, I certainly think you have it. I think you should direct your efforts particularly in the territories where the Detroit and other Louisville manufacturers have some

business. A 3 x 12 five-space piece as good as Arrow Head should knock Martin's Navy in St. Louis into a cocked hat.

* * * * *

From Dula to Nall & Williams, July 6, 1903 (R. II, 528)—

* * * As regards profits, while I would like you to show as much as possible, my idea is that you should not make money at the expense of trade, providing, of course, that you are getting this business from certain people. * * *

Same (R. II, 542) Oct. 12th, 1903—

Mr. E. S. Edwards has returned from a little trip in the Southwest and reports a growing demand for Union label goods in certain large coal companies near Fort Smith, Ark. I think it would be well for you to offer to sell direct to Jenny Lind Coal Company and the Bonanza Coal Company, whose purchasing point is either in or near Fort Smith. Your Arkansas man will very likely know where to reach them. I am informed that there are several other coal companies right in this section whose consumers are demanding Union made goods which trade is now going to Strater Brothers. You can probably get all of their business by selling them direct.

Nall & Williams to Dula, February 12, 1904 (R. II, 551)—

* * * There is a demand for independent goods, and if we do not get it some other independent concern, in my judgment, will.

July, 1903, Nall & Williams wrote Dula, addressed as "D. C. Williams" (R. II, 539)—

> I do not believe for the present that we should attempt to make any money out of this business. I think we should first get it on a solid foundation, and if we hold our prices down to where there is little or no profit, it will make some of our friends very sick. They are not in business for the love of it, and it doesn't matter where you set your price, if we keep ours low, in my judgment, they will be like the fellow between the devil and the deep blue sea, afraid to go up for fear we will get the business, and to meet our prices would mean a loss. This in my judgment will make them very unhappy. * * * I sometimes find myself in an awkward position—I am bound to strike, and sometimes I hit where I do not want to, but this can not be helped, and I believe you realize this.

July, 1903, Dula wrote Middleton, of Nall & Williams, concerning "Gorman," a brand of the Manufacturers Tobacco Company at Louisville (then independent but subsequently acquired and closed)—(R. II, 539)—

> In regard to long cut tobacco, I think it is a splendid suggestion you make, that you get out a brand similar to "Gorman." If he decides within a few days to trade with you, there can be no harm done in having this brand ready, and in the event that he does not show an inclination to trade, you can probably pound him so hard that he will be willing a little later on.

April, 1905, Middleton wrote Dula concerning attempts to destroy competitors (R. II, 657–650)—

> We are working our Cap Greenville around Paducah, Henderson, Glasgow, and Bowling Green. The man that I have in that field was in Saturday; I questioned him regarding the Nashville Greenville in that locality and requested him to send me a sample of same, which I will get this week. He reports the Nashville Greenville doing well in that section, but hurting Strater's "Cup" more than anything else; in a great many places displacing "Cup." This I think a good thing for us, as Strater has held the trade from what I understand in that section pretty solid. Now if the Nashville Greenville can knock out "Cup," then there is a chance for us to get back at Nashville Greenville, and probably get some of their business. As I understand it they are selling Nashville Greenville at no profit; our man informed me that it cost the retailer, with their schemes, about 26 cents; well, this means that there is no money in it, and I imagine the Nashville Tobacco Works, if they can displace "Cup," after a little, will want to make some profit, then it seems to me will be our chance to step in.
>
> Now regarding my making an active campaign in that field at this time, I hardly think it advisable, as I have about all the fights on my hands at present that I can take care of right, and if I get into too many scraps of this character, it will find us where I don't want to be and where I don't believe you want me to get; that is, on the wrong side of the ledger. You

> remember, in our last conversation it was agreed that I should make an active campaign in the State of Ohio, which I am now doing and losing money in that fight. * * * I think if the fight is kept up in that field, we will put "Index" out of business, just as we did in Indiana. * * * Now, my idea is we started after Strater, and I think we have got him on the go, now let us attend to his case first. When we have run him to cover, then I think we can attend to the Nashville people. * * * When our man told me what Nashville Greenville was doing, I said: "Good—between us we will get Cup between the bumpers, and will give him a good squeeze."

Dula to Patterson (of secret company), Richmond, Va., October 6, 1903 (R. II, 569): "At any rate, I think the best thing for you to do is to go right after each factory [independent] in Richmond with a brand identical to their best sellers, *i. e.*, get out a piece to go against 'Sensible' and also a piece to go against 'Central Union,' etc."

See also letter Dula to Patterson directing efforts to purchase independents (R. II, 565).

One Augustus Craft was secretly furnished with funds to establish the Craft Tobacco Company at New Orleans, intended to destroy the People's Tobacco Company of that city. The clandestine correspondence concerning it (R. II, 629–650) reveals an almost incredible state of affairs. The following is from Craft, May 11, 1903 (R. II, 633)—

> MY DEAR MR. DULA: I enclose you letter and sample paper. Please wire me on receipt

> of this if this paper and price is O. K., so I can then order it. I will as soon as the "Craft Tobacco Company" is ready for business *not only draw from the People's their principal force, but will endeavor to cause a strike in their factory.*

And this from Craft to Dula, May 12, 1903 (R. II, 633),—"You need have no fear as to my success in carrying out *your purpose* in regard to the People's Tobacco Company. I am sure to get the support of the various unions and somebody is got to get out of business eventually."

May 21, 1903, Craft wrote Hill (R. II, 636)—"I have the head engineer and foreman of People's Tobacco Company now with me and expect to draw most of my labor supplies from the People's."

September 23, 1903, Craft to Hill (R. II, 642)—

> I am placing the goods where they should be placed and am in touch with men who will see that a certain element will consume the goods. If I only get fifty consumers a day you are not disturbed, but the opposition is weakened that much. Of course, this is an expensive method, but it is intelligent, as I know the opposition will soon feel the effects of my work, as they are now complaining of trade falling off some. In your letter to your attorney here the principal is absent and one of his confidential clerks got Mr. Parker's bill and your letter-head. Do you realize what power you placed in that clerk? Of course there is no probability of its being divulged, but it gave me a scare all the same. For Heaven's sake, when writing others do not use my name *except in cases where you*

ostensibly are to fight me. * * * I realize much more than you do the immense financial loss that is at stake should the opposition in any part of the United States *know your plans.*

W. M. Carter was an officer of the Wells-Whitehead Tobacco Company, a creature of The American Tobacco Company, which loudly proclaimed independence and manufactured cigarettes at Wilson N. C., where the Ware-Kramer Company—a genuine independent—was endeavoring to build up a business. The following is from the testimony of Hill (R. II, 298):

Mr. W. M. CARTER, *Wilson, N. C.*

DEAR SIR: We are advised that a carload of cigarettes has been exported to China by the Ware-Kramer Tobacco Company. If possible I wish you would ascertain to what port these goods were shipped and the name of the consignee. If you can not learn the name, perhaps you can find out the markings on the cases, as well as the point in this country from which the goods were shipped by steamer. Yours, very truly.

[There seems to be an initial] "P. S. H." [In writing with a pen this]: A carload means to us about five million cigarettes. If we get this information I think we can shut off their market. You wrote and sent out that letter?

A. Yes. We were interested in the British-American and any information we can give them we are going to do it. We are hired to look after our business, and that is what we are going to do if we can.

Q. Did you succeed in shutting off this market?

A. I don't know anything more about it.

Q. You reported it to the British-American Co.?

A. If I got the information, I did, but I am not quite sure about that.

Here is both spying and oppression. For other spying on this company see Hill's testimony (R. II., 296).

Secret companies were useful in efforts to obtain contracts from the Government, awarded only after competitive bidding. Patterson, of Richmond, wrote Dula (R. II, 563): "It has also occurred to me that with present sentiment towards trusts the Government might be inclined to place the Navy contract with an independent house rather than the trust just to tickle the 'common people.'" They were also valuable as aid to defeat objectionable Congressional legislation (Dula, R. II, 580). Hamilton, of Bland Tobacco Company (a secret), wrote Dula in January, 1904 (R. II, 590):

D. C. WILLIAMS, *New York.*

DEAR SIR: In response to your favor of January 11, I was in Washington on the 15th and appeared before the Internal Revenue Subcommittee on Ways and Means at the hearing of the Tawney bill. While I did not intend to make any speech, force of circumstances made it necessary to state the position of my company on the bill, and I trust with some effect. I found on my arrival in Washington that I had no friends working with me, or at least not in the open. I can say, however, that the hands of the organization have been very much weak-

ened, and that Mr. Landstreet showed considerable nervousness after the meeting at the show of strength against the bill in Congress. I worked systematically on such manufacturers as desired the passage of the bill, but feared the destruction of trade-marks, and finally with the assistance of one other party who was working within their lines, got Mr. Landstreet to consent as a compromise to ask the committee to withhold any action until a circular could be sent out to the trade to ascertain their views. I was not let in on what was going on, but a friend gave me a copy of the circular, which I inclose to you. I could not under any circumstances sign this, as my position has been plainly defined all the way through in opposition to the bill. It is, however, evident that if this committee is asked under any pretext to withhold action, that it will cast serious doubt in their minds as to the advisability of ever passing it, and nothing will show more conclusively how divided the independent factories of the country are on this measure. If the Tawney bill should be reported to the House, I have every assurance that a spirited fight will be made on the floor, and if we can only get Mr. Littlefield, of Maine, as leader on the floor in a constitutional argument, followed by Mr. Shirley, of Kentucky, on the Democratic side, we will be in a good position to whip the bill even then. Mr. Dalzell, chairman of the committee, stated that while he thought that the committee was in some degree pledged to the support of the measure, that he had serious doubts as to their right to pass it, and this

> doubt seems to rest in the minds of nearly every Congressman who is a lawyer. You might submit the inclosed circular to your attorneys, and if they have any suggestions to add strengthening our side in regard to it, it is possible that I could get the changes made through the party who gave me the information. I do not know, however, that that would be necessary.

Secret agencies have been used in persistent attempts to get control of remaining competitors. Efforts were made to buy Strater Brothers of Louisville (R. II, 734); Bagley of Detroit (R. II, 732); the United States Tobacco Company, Larus, Hancock, and Dill of Richmond (R. II, 559, 560, 565, 567, 568); the manufacturers of scrap, Zahn, Scotten-Dillon, Bagley and Globe of Detroit (R. II, 345, 597; R. IV, 31, 69). They succeeded in clandestinely getting $10,000 stock in Scotten-Dillon (R. II, 740; Gov. Ex. 87, R. V). The foregoing are among the most prominent survivors mentioned in Answer of American Tobacco Company (R. I, 262).

Patterson, of Richmond, wrote Dula in May, 1903 (R. II, 559):

> * * * I have already had very satisfactory interview with the party in question. I will have him with me and their brand also by July 1, I hope. I may have to see you about this matter soon. I have engagement with him Sunday to further discuss the subject. I will be in no hurry about Mr. D——. Can get him if necessary but think can pinch him

a little in few of his strongholds and thus make him anxious. The Metropolitan Tobacco Co. can have some influence in this direction. What do you think the "Central Union" brand is worth. They sold 750,000 pounds the past twelve months and rapidly increasing so they report. * * *

Patterson to Dula, September 15, 1904 (R. II, 572):

I have been very much encouraged with the high stand our brands enjoy in this section and Central West. All of them are increasing in demand and the dealers are pushing them, especially the independent dealers. I am sure we would lose a great deal of business in everything except L. S. should we at any time lose our independence and only throw greater efforts toward competitors for the introduction of their brands by too many dealers who are inclined to push independent stuff. So long as our brands are with them they keep out just so many other independent brands. * * *

Dula to Patterson, January 26, 1905 (R. II, 577):

I inclose herewith draft of letter, which I think should be sent to the Independent Tobacco Manufacturers Association, in regard to the resolutions passed at the last meeting of the association in December. I would suggest, if this letter meets with your approval, that you write it out in longhand, and submit to Mr. Landstreet for discussion, before sending it to the association. He being president of the association, and present at the meeting that passed the resolutions, it would not be

courteous to him to take the position that this letter does without first bringing it to his attention. * * * (The Patterson Company has been controlled by Continental or American Tobacco Company since 1903.)

False advertising and deliberate deception of the public and competitors were practiced (Hill, R. II, 232–360, 635, 646; Dula, R. II, 501–635, 650–664; R. III, 144–148; Pinkerton, R. IV, 1–38).

The price list of R. A. Patterson Company, issued 1905, when The American Company owned all the stock, contained this (Ex. 65, R. V, 500):

NOTICE. Our plant is strictly and emphatically independent of all Trusts or Combines. It is useless to suggest to any thoughtful merchant how necessary it is for him to have more than one source from which to secure his goods, and therefore it is to his interest to support and encourage competition in those lines he has to buy.

The Wells-Whitehead Tobacco Company, when owned by Blackwell's Durham Tobacco Company, subsidiary of The American Company, inserted weekly during 1905 the following advertisement in the "Tobacco Leaf" (R. V, 506):

Carolina Brights.

These are Independent, Anti-Trust, Union-made Cigarettes. They give the jobber and retailer a good profit and give the consumer satisfaction. They are made from old mellow tobacco, grown in Virginia and Carolina, and are the best money and experience can pro-

duce. Delivered and guaranteed. Jobbers will please write us for prices and terms.

Wells-Whitehead Tobacco Company,
Wilson, N. C.

See also advertisement Nall & Williams (R. IV, 116).

This flagrantly false advertisement of the J. S. Young Company, licorice makers of Baltimore, appeared weekly, 1903 to 1905 (R. III, 343), while it was under control:

J. S. Young Company.
(Established, 1869.)

Being informed that reports have been circulated among our customers to the effect that this company can not continue to exist on the small business given us by the independent tobacco manufacturers, that our sources of root supply are likely to be cut off, and that we must soon be forced out of business, we desire to state that our sources of root supply are secure in spite of assertions to the contrary, made by people desiring to shake the confidence reposed in us by our customers; that we have on hand and to arrive sufficient Anatolian, Russian, and Spanish root for the next several years; and that we stand ready to supply the trade with our well-known and standard grades of Greek and Spanish licorice paste by the case or by contracts covering one or two years.

Furthermore, we believe that independent tobacco manufacturers should be alive to the fact that our competitors are particularly anx-

ious and are making special inducements to secure this trade, in order to deprive the independent licorice manufacturers of their outlet for paste, put them out of business, and then charge the consumers what prices they may please.

The independent tobacco manufacturers, therefore, should look ahead far enough to see it for their best interests, both in the matter of future independence and of future prices, to give their undivided support to the *independent licorice makers*, Baltimore, Md.

Defendants' conquest of the scrap business centering at Cincinnati strikingly illustrates how competition has been destroyed and monopoly secured. There were three leading manufacturers in that city. In 1903 The American Company, supplying the money with much secrecy through one Richards, of Boston, sent Galbraith to Cincinnati, where he organized the Queen City Tobacco Company, which manufactured and extensively advertised and sold scrap at destructive prices. It was run at heavy loss, and connection with The American Tobacco Company strenuously denied—Galbraith being a willing and ready tool. Competitors did not immediately succumb and another move seemed expedient. The Luhrman & Wilbern Tobacco Company, scrap manufacturers at Middletown, Ohio, openly owned by The American Company, beginning January, 1906, in a few months bid up tobacco cuttings (raw material for scrap) from 11 to 22 cents—more than the price of manufactured goods, less tax; and the Queen City

at the same time cut prices on its output. With this demoralization of selling prices and the Luhrman & Wilbern Company bidding up raw material, the independents at Cincinnati were naturally intimidated and hopeless; and in October, 1906, all three were secretly gathered in by The American Company through a new corporation (Dula, R. II, 603–615, 743; Hill, R. II, 306–310, 339; R. III, 140, 254; Pinkerton, R. IV, 8–13, 20, 21, 27; Hutchings, R. III, 238–255; Friedlander, R. IV, 67; McAndrews, R. IV, 117).

The following letter, written on June 22, 1904, by Galbraith, then in charge of the campaign at Cincinnati to destroy the independent scrap manufacturers, to Dula, vice president of The American Tobacco Company, indicates methods pursued (R. II, 607):

> MY DEAR SIR: I am sending to Mr. Richards to-day my expense account made up to date. I am taking it up in this way, as it will leave me clear in my future statements. * * * I am greatly pleased with the outlook for the future and shall make you feel that your confidence in me has not been misplaced. Red Band is growing here, though they never had a man in the city. Jobbers order, but are not able to get the goods. There is only one fear I have and that is that in some way the connection may leak out. I wish you would arrange that I might write you under another name, inclosing envelope inside addressed to you; also that in writing me that you sign any telegrams "Richards." I can then feel safe should anyone pump the telegraph people.

> Please arrange a telegraph address also. In case I wire you direct I will sign name W. A. Williams. Friedlander, of Day & Night, is getting busy, and I do not know what length he would go to to discredit me; he is mighty dirty. In regard to the money end, I hope you will arrange with Richards so that when we need it that there will be no delay, as I want to be in a position to pay our bills promptly, taking advantage of discounts if enough to make it an object. * * * I am afraid of your system, as some one who has seen it may see it here. That is the only drawback. If we use it we must not have anyone come in to run it. Pinkerton will get caught some day with the man he has there. Pardon the length of this letter; I want your reply.

The following from a letter of July 11, 1904, written by Galbraith to Dula is instructive (R. II, 608)—

> In reference to the Pinkerton Co. losing the union label: It is the belief of the officers of the union that they are used by the trust and they are hard at work to prove it. The first thing that made them suspicious was about a year ago when the stockholders sold their interest to a Pinkerton, who, the union claims, was merely acting for someone else, i. e., the Trust; that it could not have been otherwise as he personally did not have the money to swing it. Since that time they have watched things pretty closely. They know of visits made by him to New York and of his visiting 111 Fifth Avenue on these trips; also that he has some considerable mail from New York and tele-

grams, but from whom they do not know, though they believe it is 111 Fifth avenue. That a new and complicated system of reports has been put in and of the arrival of a man whose chief duty it is to make out such reports. Where the man comes from they have not found out, but they say they will know shortly. This information was gathered at the second talk I had with them in reference to our business here. They thought this company was connected with the Pinkerton Co. and through them with the Trust. I have told them there is absolutely no connection more than Pinkerton, jr., is in our employ; that I tried for months to get a man and had made offers to men in Bagleys, Red Horse, Day & Night, and that left me only two more to see, Pinkerton and Mail Pouch, and that I visited Pinkerton first; that I had also written Fischer, their president, and he could not do anything for me. To make it short, I convinced them by stating the facts in which there is no flaw. I had told you that I did not want any connection with the Pinkerton Co.; that I knew I could handle it better alone; events have proved this.

Had I agreed to Pinkerton's urgent suggestion we would both have been lost, for the only thing they have against us is the thought that it was Pinkerton. They told me on Saturday that they were entirely satisfied. Now, as for the remedy. I should advise taking that man out of there at once. Don't let Pinkerton wire you or wire him unless the message comes from outside New York. Look out for

typewritten letters in plain envelopes with blue paper going to him; they are marked and are liable to go astray. Allow him to change the system with fewer reports, though it could be kept about as you now keep it. Pinkerton should use the utmost care at all times. A man gets careless and does not realize the danger until too late. I will know more this week about the result of an executive meeting held in Louisville yesterday when this matter was discussed. There are other factories being watched, not by duffers but by clever detectives, though I have not dared inquire who they are, except it was dropped that one was F. R. Penn Co. On future purchases of firms do not incorporate them; arrange it in some other way, if possible. If corporations do not reincorporate, allow them to keep their books in their own way; or if changes are necessary, have a local or near-by audit company do the work. The union is out for blood and they are getting wise. It may seem strange to you that I have picked up so much since a few days ago, but to appreciate the situation one must be on the spot. The strain has been heavy. I am sure I am right on this and I am sure that unless you adopt some remedy you will be exposed in more places than one. I can not tell for sure whether I am out of the woods or not, though they have signed the agreements with me and have announced the fact before the Central Labor Unions that the concern is strictly union. I shall use the greatest care in the world in all matters, and I am sure there will

be no trouble if you will allow me to handle this as it seems to me best. I have only the Pinkerton episode to live down, and I have satisfied them so far on that. My heart is entirely in this venture, and if any man can make it go I can and will; but give me all the help possible by giving me a chance to get results and by keeping me clear from risks. I feel more confident every day that I am here, and we will win in the end.

I hope you will understand and appreciate my position. I am not weak hearted and never will be, but I am so anxious to make this go that I do not want to take any chance, at least none that are not necessary. This venture means as much to me as to you and more, for it is my future against your money. I have so much at stake that there can be no failure from any fault of mine. I want you to help me in the ways I have asked, and if you do the issue will never be in doubt.

See in this same line many letters from Pinkerton, another secret tool. (R. IV, 1–38.)

Some years ago tobacco manufacturers not then connected with the "Trust" organized an association primarily intended for protection against it, and Landstreet, of the United States Tobacco Company, Richmond (a really independent concern), became the president. Later, under the advice of Dula, he was employed by the secretly controlled R. A. Patterson Company, of Richmond, which posed as independent and was member of the association. Landstreet thereafter continued as presi-

dent until forced out by a demand for an affidavit or otherwise (R. II, 560, 575, 577–581; R. IV, 65).

Friedlander, of the original Day & Night Company, Cincinnati, became the secretary of the association. Secretly he sold out to the "Trust," but retained the records (R. IV, 65).

Nall & Williams, of Louisville, another secret concern, was a member. Being "a wolf in sheep's clothing," Middleton, of that company, with some feeling, wrote to Dula, February 6, 1904: "The finger of suspicion has been pointed at me until I am getting touchy on the subject" (R. II, 655, 657, 658). These and other "wolves" were used to secure information and kept the "Trust" advised.

One use of "supply" companies was to obtain through them information about the business of competitors. The Mengel Box Company, for example, was required to report monthly the number of boxes which it sold to independents (R. II, 663).

Extensive advertising influences both business and public sentiment. In 1906 The American Tobacco Company in its own name spent $10,000,000 for advertising and distributing free goods (Hill, R. II., 252). Controlled companies are also large advertisers; and the sums spent by all are enormous. The possible influence of such outlays and its ramifications is apparent.

The foregoing and much more similar evidence can not be swept away and a conclusion directly against it established by a mere general statement of his reasons

for selling out to the "Trust" brought out in the cross-examination of a witness in their employ, and theretofore a tool in operating a secret company, who was called by the Government to prove certain facts peculiarly within his knowledge. (See opinion of Lacombe, J., R. I, 292; and Friedlander, R. IV, 62 *et seq.;* Hill, R. II, 345.)

XIII.

Opinions and Final Decree.

Each judge filed an opinion—Lacombe, Coxe, and Noyes concurring, Ward dissenting (R. I, 291–328, 164 Fed., 700). The majority held defendants were engaged in interstate and foreign commerce and parties to combinations which directly restrained it; but they did not decide whether the evidence established monopolies or attempts to monopolize within section 2 of the Sherman Act, although the subject was discussed by Noyes, J. Relying on *United States* v. *E. C. Knight Co.*, Ward, J., concluded there was no direct restraint.

An attempt to summarize these opinions would be unprofitable—they are compact and must be read in order to be fairly understood. But some things said by the presiding judge call for comment.

He suggests that the evidence fails to show that defendants have practiced unfair, wicked, or oppressive trade methods; and apparently he intends to convey the impression that they have not in fact injured commerce. All this we emphatically contro-

vert; and we submit that the evidence in the record, some of which has been pointed out above, conclusively establishes the contrary.

Moreover, we do not concur in the extreme construction of the Sherman Act announced by this learned judge, according to which an ordinary partnership entered into in good faith by competitors in interstate commerce necessarily becomes illegal, and *any* direct elimination of competition in interstate commerce through a contract or combination is criminal. We regard this as unwarranted by the decisions and untenable. It would hinder rather than aid the purposes of the lawmakers; and certainly it is not essential to support the Government's insistence in the present proceedings wherein actual intent to restrain, material and unreasonable restraint and oppressive methods have all been established. We have pointed out *ante* p. 52, that in order to be illegal the direct effect or necessary tendency of the denounced combination must be the *material* restraint of commerce; and that nothing else appearing those ordinary business arrangements always sanctioned and enforced at common law are not affected by the statute.

THE FINAL DECREE.

1. Dismissed the petition as to Imperial Company; British-American Company and domestic corporations controlled by it (W. S. Mathews & Sons, T. C. Williams Company, David Dunlop, Incorporated); United Cigar Stores Company (retail branch of the combination and the individual defendants).

2. Adjudged the others parties to an unlawful combination (contracts and conspiracies were not specified) and enjoined them generally from continuing therein or doing anything in furtherance of the same (there was no finding as to monopoly).

3. Adjudged that The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, and MacAndrews & Forbes Company (The Conley Foil Company was not included) were unlawful combinations and restrained them from engaging in interstate or foreign commerce.

4. Adjudged that The American Tobacco Company, American Snuff Company, American Cigar Company, P. Lorillard Company, R. J. Reynolds Tobacco Company, Blackwell's Durham Tobacco Company, and The Conley Foil Company (but omitted other defendants, Havana Tobacco Company and British-American Tobacco Company) held shares in specified corporations (it omitted the Imperial Tobacco Company, British-American Tobacco Company, United Cigar Stores Company, and all corporations not named as defendants) and enjoined them from acquiring the plants or business or voting the shares of and from exercising control over the issuing companies (collecting dividends was not prohibited); and further enjoined the issuing companies from permitting control.

5. Adjudged costs in favor of petitioner; directed that nothing therein should prevent defendants from prosecuting or defending suits; and that the injunction should be suspended pending appeal.

XIV.

Errors assigned by The American Tobacco Company and others.

These defendants complain because the petition was not dismissed; more specifically, (a) because they were adjudged parties to a combination in restraint of interstate and foreign commerce, and enjoined accordingly; (b) because certain defendant corporations holding shares in others were enjoined from voting them or exercising control over the issuing company, and the latter from permitting this; and (c) because The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company and the MacAndrews & Forbes Company were adjudged unlawful combinations and restrained from engaging in interstate and foreign commerce.

The Government established violations of section 1 of the Sherman Act by proving, *first*, the existence of a combination, and, *second*, that the direct result or necessary tendency of this was the material obstruction, hindrance, and restraint of interstate and foreign commerce. The conditions demand a decree adequate to destroy the mischief—one which will effectually roll away the impediment. "The relief granted should be adequate to the occasion." *Trans-Missouri* case, 166 U. S., 308.

A combination is "the union or association of two or more persons (or corporations) for the attainment of some common end." Century Dictionary, Noyes on Intercorporate Relations, sec. 302.

Defendants do not deny union and association of individuals and corporations for a common end. But relying on the *E. C. Knight* case they assert that those disclosed directly concern production and manufacture alone and that any restraint of interstate or foreign commerce is indirect and incidental. They further contend that union of competing businesses through executed sales and transfers of property to a corporation acting within the provisions of a State charter does not constitute unlawful combination, unless the main or primary purpose is unlawful.

This court has often pointed out what is interstate and foreign commerce (*Swift & Company* v. *United States*), and the answers, admissions, and evidence concerning defendants' business establish that they and their predecessors have long been actively engaged therein. They buy leaf through representatives in all important markets in this country, Cuba, Porto Rico, and Turkey, and cause this to be transported to their factories; they also purchase and assemble other crude materials; through many agents located or traveling, in every part of the United States and abroad, orders for manufactured products are solicited, forwarded to the general office, and complied with by deliveries to common carriers; they sell and deliver their output to wholesalers, jobbers, other

merchants and dealers in this country and abroad, some of which they directly control; operations are conducted in the name of The American Tobacco Company at New York and at nineteen branches in many States and by subsidiaries in different localities. They purchase the major portion of most types of domestic leaf; own and control the great leading brands of manufactured tobacco indispensable to merchants; produce, sell, and distribute more than three-fourths of the domestic tobacco products (except cigars); control production of essentials for manufacture, etc.; and are possessed of tremendous financial strength.

The defendants are not mere manufacturers nor are their operations confined to a single State. The business of manufacturing goods in one State and then selling and shipping them to merchants or consumers in another is a part of interstate commerce (*Loewe* v. *Lawlor*); and when several competitors are so engaged there is competition in such commerce.

The relationship among them enables The American Tobacco Company to control (except the Imperial, with which there is agreement) and use all in unified tactics against opposition. Their power in concert to fix prices and suppress possible future competition necessarily follows from uncontraverted facts. See Opinion Coxe and Noyes, JJ., R. I., 295, 305.

The record discloses a series of combinations—beginning in 1890—organized with the express purpose to destroy and which did destroy all competition between powerful competitors in interstate and foreign

commerce in tobacco; and that such commerce has been materially affected thereby. These were not brought about by *mere* acquisitions of manufacturing plants in the ordinary course; they were far more—business, good will, agreements against competition, etc., were included, and all were parts of an unlawful plan, whose development and progress was advanced by duress, oppression, and unfair methods intended to drive out and keep out competitors and secure monopoly.

The decisions of this court establish that any combination which directly destroys competition, in its broad and general sense, hinders and restrains commerce and is unlawful.

The purposes of the antitrust legislation can not be frustrated by operating through a corporation. The Northern Securities case seems decisive of this, although the acquiring company does no interstate business; where all are engaged therein (as in the present case) the doctrine is still clearer. The Pearsall case; *Swift & Co.* v. *United States; Loewe* v. *Lawlor.*

The *E. C. Knight* case is not controlling. If that opinion must be construed as defendants contend, it was overruled by the *Northern Securities* case, which is wholly inconsistent with what they now claim. The remedy sought is not the same as there; the facts are radically different and the conclusion of the court concerning the direct effect of the argument on interstate commerce is impossible here. In

his opinion in that case the Chief Justice said (17): "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." The proofs here under consideration establish not only intention to put a restraint upon commerce, but consummation of the plan. In *Loewe* v. *Lawlor*, the Chief Justice likewise said: "The undisputed facts [in the Knight case] showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intention of the combination determined its legality." Here it conclusively appears that the arrangements were intended directly and materially to restrain interstate and foreign commerce and that such was the actual result.

In *Northern Securities Co.* v. *United States*, Mr. Justice White said of the *Knight* case (395): "As the contract merely concerned the purchase of stock in the refineries and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause the fact that ownership of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership." Here the contracts concern vastly more than mere purchase of stock or acquisition of property and are full of conditions directly relating

to interstate commerce. Purchased businesses, e. g., were parts of commerce and the whole plan directly related thereto.

The present complaint is not merely as to acquisition and ownership of stocks or other property, but is against what defendants have done and are now doing in commerce. Competition has been persistently destroyed; scores of contracts have retired skilled men from the trade; many have been forced out; and the necessary result of the plan long followed has been to give defendants power to exclude others and exercise monopoly. Their fixed purpose to attain these results may not be doubted. The monopolies, agreements, and combinations disclosed directly restrain and obstruct not only the manufacture but the purchase, sale, and exchange of both crude and manufactured commodities among the States and with foreign countries. The facts here plainly show this within the doctrines often announced by this court and especially in the Addyston Pipe case, *Montague* v. *Lowry, Swift & Company* v. *The United States,* and *Loewe* v. *Lawlor.* The remedy asked by the Government finds support in all the opinions in the Northern Securities case.

All admit that manufacture is not always and for all purposes to be considered as part of commerce and that monopoly of it is not necessarily a monopoly of commerce. But where a given line of business looked at as an entirety clearly is of interstate commerce and manufacture is one of the necessary stages

in its ordinary course, then if a single corporation, through combinations of the manufactories, acquires dominion over all such business, interstate commerce is monopolized. The principal corporations subject to the present inquiry were and are not merely engaged in manufacture but also in buying and selling in different States and abroad, all as a part of their customary business. Again, even though manufacture should never be considered as a part of commerce its monopolization may be brought about with the express purpose and effect, as in this case, of utterly defeating the lawful will of Congress touching the freedom of commerce, and in such event the monopoly is subject to Federal power, as we have undertaken to show ante, Part II, p. 31.

The American Tobacco Company was organized in 1890 with the purpose and effect of destroying competition in cigarettes and securing monopoly. It promptly extended operations to other departments and has continued an effective instrumentality for perfecting defendants' unlawful designs.

The Continental Tobacco Company was organized in 1898 to unite powerful competing producers and distributers of plug tobacco and through it competition was effectively destroyed and monopoly acquired.

The same purpose and effect characterized the Consolidated Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, and the MacAndrews & Forbes Company. To the last of these the provisions of the Wilson Act are particularly applicable.

The final decree did no more than was necessary to destroy the unlawful combinations and prevent future violations—in fact, it did not go far enough. Prohibition of acts in furtherance of the combination and also of control by one corporation of another is abundantly supported by *The Northern Securities Company* v. *United States; Swift & Company* v. *United States;* and *United States* v. *D. & H. R. R.*

That part of the decree which adjudges The American Tobacco Company and other corporations unlawful combinations and enjoins them from engaging in commerce seems without a precedent directly in point among the decisions of this court; but it harmonizes with the duty effectively to enforce the act by properly molded decrees. *Swift & Company* v. *United States.*

The specified corporations are combinations in restraint of trade; they were organized by individuals associated for that purpose; their operations are unlawful and must be prevented in some effective way. The original constituents (acquired businesses) can not now be identified and practically separated from each other by a decree. There are two feasible ways to meet such a situation; one is to enjoin the companies as was done below; the other is to appoint a receiver and require him to undo the mischief by some process of disintegration. If serious inconvenience to the public would result from excluding a corporation controlling sources of supply from interstate trade, it might be decidedly preferable to appoint a receiver who could temporarily supply the

demand and gradually restore competitive conditions. Obstructions to commerce should be removed by some practical procedure adopted with a view to public convenience.

The American Snuff Company controls the domestic output of snuff and the MacAndrews & Forbes Company licorice products. The operations of these companies (corporate combinations) are unlawful and must be prevented either by injunction or through receiverships within the principles described above. This question is open under the Government's Assignment or Errors, No. VI (R. I, 340).

The very existence of certain defendants is criminal and certainly they can not rightfully complain because restrained from carrying out the unlawful purposes of their creation; they are willfully in positions where every act is a transgression.

Unlawful intent is a necessary inference from defendants' uniform plan of operations; that they have exercised duress, unfair and oppressive methods has been pointed out. The theory of "main intent of purpose" in connection with combinations and also the applicability of the statute to executed contracts is discussed *ante*, pages 51, 121.

* * *

To most of the objections urged against the decree below adequate replies have already been indicated, but it seems appropriate to add a word concerning some. Arguments, of course, should be confined to questions arising out of the peculiar facts established; speculative problems belong to another form.

(*a*)

It is said that the *Knight* case is controlling; that if restraint of any trade exists it is wholly intrastate, etc.

The *Knight* case certainly did not uproot all power in Congress effectively to regulate what this court has defined to be interstate commerce. The various businesses unified by defendants through the manipulation of corporations were parts of interstate commerce. The direct result of the combinations and contracts complained of has been to destroy competition in such commerce and to bring it under the dominion of the defendants. In view of the facts clearly established, it is quite impossible to conclude that interstate trade has not been restrained or that it was not the object in reference to which defendants entered into the challenged contracts and agreements.

And if defendants are confining themselves to intrastate trade, why such strenuous objection to a decree forbidding them to engage in interstate trade? Attention is asked to the frequent comments upon the *Knight* case, which appear above.

(*b*)

It is insisted that the principal transactions complained of were the consolidation of competitive manufacturing concerns through corporations and the purchase by corporations of property belonging to competitors, and that such dealing with respect to property not charged with public use does not

constitute a contract, combination, or conspiracy in restraint of trade.

Of course, every mere acquisition of property or business neither constitutes nor indicates a combination in restraint of trade; but we are concerned with what the present record reveals. Through a series of years defendants in combination and concert have acted with the express purpose and effect of destroying competition, restraining trade, and acquiring monopolies; and as means to these ends they have acquired and are using certain properties, businesses, etc. The result is the very thing which the Sherman Act was designed to prevent, and the mere fact that transactions were in the form of acquisitions can not be allowed to defeat the law.

(*c*)

Defendants maintain that there is a difference in principle in the case of public service and private corporations.

No doubt there is a difference between what such corporations may do; but neither may violate proper rules laid down by Congress for the government of commerce. Admittedly a dozen private corporations controlling interstate trade in a given commodity can not by simple agreement destroy the competition amongst themselves. And we maintain that the stockholders of these can not, as the result of agreements amongst themselves, unify these businesses through a new corporation, all of whose stock they own, which immediately after birth acquires a

monopoly and thereby brings about results more detrimental to trade than any which could possibly follow a simple agreement.

(*d*)

Counsel say that trade or manufacturing corporations are under no duty to compete, and that if noncompetition results from acquisitions the law is not violated.

This premise does not justify the suggested conclusion, for the acquisitions themselves may be, and in the present case were, the means for carrying out prohibited agreements and combinations. Moreover, while there may be no duty actively to compete, private corporations are prohibited from destroying the possibility of competition by contracts or combinations. The destruction of competition between the competitive concerns revealed here was brought about and is continued through agreements amongst their owners and stockholders. For a number of competitors to organize a new corporation, transfer to it their business, divide the stock amongst them and thereafter act in concert, all as a result of a prearrangement, constitutes too thin a mask to deceive.

(*e*)

Defendants say that the remedy decreed defeats the object of the act and demonstrates that it was not intended to prohibit the thing declared illegal.

The statute expressly requires the courts to prevent and restrain violations of it. With the wisdom of this we have nothing to do; the duty is to enforce the will of Congress. It seems rather preposterous to maintain that illegal restraints of commerce must continue because to destroy them would interfere with the conduct of business in ways satisfactory to those violating the law. The statute's ultimate object is to insure the possibility of competitive conditions; and unlawful combinations or monopolies interfering therewith should be removed. This being done, in the future as in the past, those acting within the law may be relied upon to conduct all commerce necessary to meet the demands of the public.

XV.

Errors assigned by the Government; and remedies which should be applied.

Full relief as prayed should have been granted. Errors complained of—specified in detail, Record I, 338, 343—with appropriate remedies will be considered under the propositions following.

1. *The petition should not have been dismissed as to the individuals.*

The purpose of the proceeding is to secure the effectual destruction of existing and prevention of threatened mischief. The corporations are mere instruments of the individuals who planned and brought about present conditions. If not enjoined, they may at any time sever connection with de-

fendant corporations, organize new ones and through them, or otherwise, carry on their unlawful purposes. No reason appears for leaving entire freedom to the intelligent manipulators who are directly responsible. The corporations and their officers are all guilty; and the injunction should run against all. The necessity for such action was pointed out in the *Trans-Missouri Freight Association* case, wherein it was held that injunction was proper even after dissolution (166 U. S., 308).

In *Northern Securities Company* v. *United States* there were individual defendants. The petition was not dismissed as to them; and the final decree adjudged that defendants "entered into a combination or conspiracy in restraint of trade and commerce among the several States," denounced as illegal by the act of July 2, 1890. In the *Swift* case the petition was sustained as to the individuals, and they were included in the injunction.

2. *Observance and every act done in pursuance of the English contracts (of September, 1902), within the United States, should have been declared unlawful and prohibited. The petition was wrongfully dismissed as to the Imperial Tobacco Company, British-American Tobacco Company, and domestic corporations controlled by the latter.*

A paragraph in the opinion of the presiding judge below (R. I, 294) contains the only reason given for dismissing the petition as to the Imperial and British-American companies. It asserts that the contract of September, 1902, was made in London

where it "was a legal and proper one;" but the record contains no proof to support this legality and propriety. The explanation of the court's action is thus expressed: "It may be an enlightened public policy to prohibit an alien corporation from buying its raw material in this country unless it sends its products here to compete with American manufacturers; but if it be, this act seems not to have gone to that extent."

We respectfully submit that the opinion indicates an entire misapprehension of the English agreements, and that the reasons assigned for a decree in favor of the foreign companies are unsubstantial.

For a long time before 1902 the American Tobacco Company and subsidiaries were the most important American concerns trading in tobacco; and their business extended to foreign countries, including Great Britain. Their most formidable competitors located in the latter country were old establishments which manufactured from American leaf, largely supplied their domestic markets, and also sold and shipped their brands elsewhere, including the United States.

The American Company (in 1901) purchased Ogden's Limited, of Liverpool, which did both domestic and foreign tobacco business, and through this and otherwise undertook to procure increased trade in Great Britain. The old companies there thereupon consolidated through the Imperial Company and a fierce world-wide conflict broke out between the two combinations. The Imperial Company and its pred-

ecessors purchased annually in the United States more than 50,000,000 pounds of leaf (over half of all exported to Great Britain, the largest foreign market) in sharp competition with the American opponents; likewise they sold manufactured tobacco throughout the world; and they were importers of tobacco products into the United States.

Under these conditions the competitors determined to end the conflict—in their own language, to "amalgamate" their business in England and also their export business from that country and the United States. Accordingly, they executed in England the two contemporaneous agreements of September, 1902 (Exs. 1 & 2, R. I, 111–124, *ante*, p. 206) and have strictly observed them.

The Imperial Company immediately took over Ogden's Limited (export business not included), issuing therefor about 2,700,000 pounds sterling stock and admitting officers of the American companies to its board of directors; the British-American Tobacco Company was organized with 6,000,000 pounds capital—divided two-thirds to the American combination, and one-third to the Imperial Company—and took over the export business of both combinations with covenants against competition; the American companies and certain directors agreed not to engage in the tobacco business outside of the United States, its dependencies, and Cuba, especially not in Great Britain; the Imperial Company and its directors agreed not to engage in the tobacco business beyond Great Britain and especially not in the United States

(the right to buy and treat leaf tobacco in this country being reserved); each combination agreed that within allotted territory the other might manufacture all its brands under recipes to be furnished, and that no sales should be made to anyone who intended to export the goods to another's exclusive territory, etc. (R. I, 111–133).

These contracts must be considered together and no short statement can give adequate understanding of them. In the light of circumstances then existing their obvious and inevitable result was materially to restrain commerce in the United States—such a purpose is a necessary inference. The evidence establishes actual unlawful intent, direct material destruction of competition and material hindrance—all in positive violation of both the Sherman Act and the antitrust provisions of the Wilson Act.

It is said that the contracts were made in England where they were lawful; that the Imperial Company's acquisition of Ogdens was simply the purchase of a rival with assets and good will to suppress certain competition in England and not to regulate prices; that owing to the tariff laws of the two countries effective competition was not possible; and that the transfer to the British Company of the export business was simply a purchase and sale with proper and necessary covenants without combination of a number to stifle competition or fix prices.

In reply to the contention that the contracts were valid where made it suffices to say that the law of England is matter of fact to be proved by competent

evidence, and there is none in the record. The only evidence concerning their validity was given by Mr. Fuller, a defendant. He was asked: "Did you hear any objection to these contracts being illegal or invalid under the laws of Great Britain?" and replied: "No, sir; on the contrary, I understood that they were certainly valid" (R. IV, 719).

No arrangement, foreign or domestic, can protect parties acting here in violation of our statutes.

The contracts and surrounding circumstances show that the acquisition of Ogdens was not simply a purchase by one English company of the business and assets of another in the ordinary course, but that much more than a sale of property in England was both intended and accomplished.

Ogdens was purchased by the American Tobacco Company in 1901 for $5,347,000—about 1,300,000 pounds (R. II, 50), and afterwards became obligated to English customers to distribute among them for five years all profits, and in addition 200,000 pounds sterling annually. "It didn't have any money of its own; it wasn't making enough profits to pay its way, so it had to borrow money" (Harris, R. III, 432). Thereafter (in 1902) it was turned over to the Imperial, the latter issuing for good will, etc., 1,500,000 pounds of stock, and for the tangible assets (not including the export business) 1,217,000 pounds more—2,717,000 pounds in all, or a little over $13,000,000 (Harris, R. II, 56).

The American Company owned Ogdens Limted but the contracts were also signed by the Con-

tinental Tobacco Company, American Cigar Company, and the Consolidated Tobacco Company, and each (also certain directors) stipulated that it would not "either solely or jointly with any other person or persons, company or companies, directly or indirectly, carry on or be employed, engaged, or concerned, or interested in the business in the United Kingdom of a tobacco manufacturer, or in any dealing in tobacco or its products therein, or sanction the use of its name in connection with any such business therein," etc. (R. I, 116). The Imperial Company (alleged mere purchaser) and its directors similarly covenanted against engaging in the tobacco business in the United States except to buy and treat leaf. And it was further agreed—

> Par. 22. The American Company, the Continental Company, the Cigar Company, and the Consolidated Company, together with their directors, entering into the covenant aforesaid, are to give the Imperial Company in the United Kingdom the full benefit of their good will and support, and, on the other hand, the Imperial Company, together with its directors, entering into the covenant aforesaid, are to give the American Company, the Continental Company, and the Cigar Company in the United States the full benefit of their good will and support, and with a view to giving further effect to the intention of the parties as in this clause hereinbefore expressed the allottees of the said 1,500,000 ordinary shares of the Imperial Company are not to sell or transfer more than 10 per cent of the said shares within the period

of five (5) years from the date of their allotment, if and so long as the present directors of the Imperial Company, or some of them, shall hold not less than 3,000,000 ordinary shares of the Imperial Company.

And yet the court is asked to believe that the arrangement "was a simple agreement for the sale of property and good will of corporation 'A' to corporation 'B'"!

The charter of the British-American Company recites that it was formed to carry out the arrangement between the two combinations; it took over the export business from both countries with the right to use all brands, trade-marks, etc., "now owned or hereafter acquired or adopted," issuing stock therefor; each of the old companies agreed that it would not "either solely or jointly with any other person or persons, company or firm, directly or indirectly, carry on or be employed, engaged or concerned, or interested in export business." With the outward semblance of sale there was really combination of competitors and division of territory.

The practical results are that the American companies are forbidden to export from the United States, and likewise the Imperial from Great Britain; that all competition between the old concerns as sellers has been annihilated; that the British-American Tobacco Company has a monopoly of exporting tobacco products; that the former competitors are jointly interested in the profits of the Imperial and of the British-American Company, and also in prices paid for

leaf and obtained for goods; that the American companies have been enabled to sell two-thirds of their Imperial Company stock at a large profit, but continue to be important stockholders and select three directors; that at least 6,000,000 pounds of leaf, formerly purchased here by the Imperial Company for the export business in competition with the American companies, is now bought by the latter for the British-American Company along with all other leaf required by it; that while the Imperial Company maintains an agency in this country for purchasing leaf, the relationship between it and the American companies is so intimate as to preclude genuine competition; in short, all motive therefor has been destroyed and the world's business parceled out.

The petition asked (Prayer 2, R. I, 107) that the combination, evidenced by agreements of 1902, be declared illegal and that defendants be restrained from acting in pursuance thereof within the United States. Their strict observance is admitted; they are unlawful; and all parties before the court should be enjoined from acting thereunder.

It is likewise asked (Prayer 3, R. I, 107) that the Imperial Company be enjoined from doing business within the United States until it shall cease to observe the agreements of 1902. This observance is a violation of our law which the court should prevent; and the effectual way is to enjoin the company as prayed. Congress has declared the "enlightened public policy" and made it obligatory upon the courts.

The antitrust provisions of the Wilson Act as well as the Sherman Act are wholly inconsistent with the suggestion that tariff laws in effect give license for foreigners to contract with domestic corporations against all attempts to compete.

In 1902 and before, certain of the goods manufactured by the Imperial Company were imported and sold by it in this country; and the American companies likewise exported largely to Great Britain. Active competition occasioned the execution of the agreements. Bearing in mind that the combination was formed September 27, 1902, the statistics concerning exported manufactures of tobacco forcefully answer the argument that commerce was not and could not have been seriously affected.

Exports from the United States to Great Britain, and their value, in fiscal years ending June 30th were—

1902—Cigarettes, 158,484,000; value, $338,276. Plug, 4,212,352 pounds; value, $811,140.

1903—Cigarettes, 127,548,000; value, $371,984. Plug, 1,753,106 pounds; value, $398,417.

1904—Cigarettes, 30,965,000; value, $84,285. Plug, 1,041,814 pounds; value, $202,305.

1907—Cigarettes, 5,976,000; value, $14,797. Plug, 1,344,557 pounds; value, $215,028.

(See Commerce and Navigation of the United States, 1906,pp. 751, 752, 753; 1907, pp. 768, 769.)

The petition asked (Prayer 4, R. I, 107) specifically that the British-American Company be adjudged an unlawful instrumentality and enjoined from doing

business; and further (Prayer 6, R. I, 108), that it be restrained from holding shares, etc., in other companies. This corporation was specially formed to carry out the contracts of September, 1902, and whatever it does here is in furtherance of them and unlawful.

Following the general plan British-American Tobacco Company acquired the shares and controls certain domestic corporations—defendants, T. C. Williams Company, W. S. Mathews & Sons, David Dunlop, (Inc.)—and has a monopoly in export trade. The decree below declared unlawful and prohibited such control by domestic companies over others. A foreign charter can not give license here for things criminal when done by a domestic corporation (R. I, 294).

3. *The petition should not have been dismissed as to the United Cigar Stores Company.*

A material part of Judge Cox's opinion (R. I, 302) is devoted to showing why no injunction should issue against the United Cigar Stores Company. The Government did not ask that this defendant be prohibited from doing interstate business; but sought to prevent The American Company from controlling and using it to destroy competition and acquire more complete monopolies. This would leave it standing alone to work out its own destiny.

The United Company was organized in the spring of 1901 with $2,500 paid-up capital by parties not then connected with The America Tobacco Company (R. III, 97, 98), but in November following its possibilities were recognized, and its originators,

appreciating the tremendous advantage of the association, surrendered control (R. III, 99, 100). Since then The American Tobacco Company has put millions into the enterprise (it holds $1,350,000 of $1,650,000 stock, also $2,850,000 bonds), and results have justified expectations. In 1907 its sales at retail were $16,000,000 and profits very large. This company is accorded special privileges over other retailers—a discount of 5 per cent—and is supported by defendants' united power. To compete with it under existing conditions is beyond the reasonable hope of any ordinary dealer. A growth from nothing to $16,000,000 in seven years indicates something beyond mere business ability.

The purposes for which The American Company intends and uses the United sufficiently appear from letters in the record which are set out *ante*, pp. 198–202, together with the evidence there collected.

The permanent success of tobacco manufacturers depends upon the friendly cooperation of retailers. The answer says (R. I, 258): "Of course, the good will of the wholesale dealer and retail dealer is to be desired by a manufacturer." Control of retailing in the populous centers is one of the most insidious and effective methods devised by defendants for perfecting their plans.

In order to allay opposition and secure headway, ownership of the United Company was long concealed and denied—how strenuously is indicated by the false statements in a letter from the vice president of The American Tobacco Company, copied *ante*, p. 200.

It is said in defense of the United Company that it sells the goods of any manufacturer. Its managers have acumen, and, of course, will supply a demand already worked up. "In the tobacco business a manufacturer must create such a condition that consumers will call for his products" (Ans. A. T. Co., R. I, 258). Defendant Duke says (R. IV, 416): "I told Whelan he must supply the demand for the goods the public wanted or else he would fail in his business, and if they wanted goods made by other manufacturers than The American Tobacco Co. he must supply them; supply them just as regularly as he would our goods. * * * Yes; they can't succeed unless they do it in that way." It is wise to get the profit, hold the customer, and gain control of distribution.

Consideration of well-known trade methods will suggest the effectiveness of the course pursued. If a manufacturer must depend on a powerful competitor to distribute his goods he may confidently expect early bankruptcy. Moreover, refusal to sell independent goods would have disclosed the carefully guarded, often denied, secret connection with the Trust (R. II, 232).

The United Company owns shares of other corporations through which it operates; is actively engaged in interstate commerce; and following the general plan is seeking control in the retail trade. The stores operated are not now very numerous but their sales (the important consideration) are very large; and for obvious reasons shops for retailing tobacco *exclusively* are not likely to become a very large proportion of all

the places where such sales are made. The time to prevent monopoly is before the possibility of competition has been utterly destroyed. *Montague* v. *Lowry*, 193 U. S., 28–46.

4. *The final decree should have adjudged defendants parties to unlawful contracts and conspiracies.*

The defendants have long operated in open violation of the law. Its future enforcement and their proper punishment may be materially aided if this court declares that the record reveals unlawful conspiracies.

"A conspiracy is sufficiently described as a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Pettibone* v. *United States*, 148 U. S., 197–203; Noyes on Intercorporate Relations, Secs. 324 *et seq.*

5. *The final decree should have adjudged that defendants were attempting to monopolize and had monopolized parts of commerce (Assignment 2, R. I, 339). More particularly it should have adjudged that The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, The Conley Foil Company, and the British-American Tobacco Company were severally attempting to monopolize and had monopolized parts of commerce (Assignment 6, R. I, 340). And appropriate remedies should have been applied.*

The lower court decided nothing concerning monopoly, although Judge Noyes discussed the subject. All concurring judges may have concluded that the decree pronounced gave the full measure of relief possible in any event; but the Government distinctly charged violations of section 2 of the Sherman Act, introduced abundant supporting evidence, and we submit the point should be decided, especially as effective relief as against the British-American Company and the Conley Foil Company may depend upon it.

The petition asked that *all* defendants be declared parties to attempts to monopolize and to existing monopolies (R. I, 108), and specifically that the American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, and the Conley Foil Company be declared to have monopolies. Except the Foil Company, those named were adjudged unlawful combinations and enjoined; the petition was dismissed as to the British-American Company; and the Foil Company was restrained from permitting control by the American Company. Both the British Company and the Foil Company have monopolies.

The relevant principles of law were considered, *ante*. Violations of section 2 appear sufficiently established by showing power to fix prices and destroy competition acquired by the unification or combination of competing businesses through corporations. If it be necessary to show coercion,

duress, unfair or oppressive trade methods they clearly appear from the facts collected and reviewed, *ante*.

Monopoly is a practical conception and its existence must be determined by practical considerations, keeping in view the purposes and methods of business. The effect of defendants' action upon commerce among the States and with foreign nations is not accidental, secondary, or remote; that commerce is the direct object of attack; and to control and dominate it as to purchases, sales, and otherwise, is the special purpose for the sake of which the several acts and courses of conduct are done and adopted. *Swift & Co.* v. *United States*, 196 U. S., 375, 397.

The history and operations of The American Tobacco Company disclose a constantly expanding purpose to acquire dominion and the present possession of power to control prices of tobacco (except cigars) and other commodities; to destroy existing competition and to deter attempts by others.

The American Snuff Company was organized to combine competitors and hold a monopoly; and as the result of systematically combining competitors and acquiring control of them it has now 96 per cent of domestic commerce in snuff. No important competitor remains.

The American Cigar Company and the American Stogie Company were organized to combine competitors and monopolize. Neither has yet been able to secure a practical monopoly; but they are trying and in a brief time have made material progress.

The MacAndrews & Forbes Company was organized to secure and has obtained a practical monopoly of domestic and foreign commerce in licorice root and its products; and all substantial competition has been destroyed. One former competitor (Lewis, who manufactures about a million pounds annually) remains; but he depends on the combination for raw material and exists by sufferance. This company, as the result of combinations, unifications, unfair trade methods, etc., controls more than 95 per cent of the trade. Contracts at remunerative prices with the American Tobacco Company and subsidiaries (who together utilize much the greater part of licorice products) insure substantial dividends and leave it in position easily to ruin any venturesome antagonist. The Wilson Act is peculiarly applicable to this company. The intentional destruction of competition between importers is patent.

The Conley Foil Company was organized to take over the business of John Conley & Son and bring it under control of the American Company. Within the doctrines announced by the court below it probably did not become immediately an unlawful corporate combination; but the power of its principal owner and acquisition of a competitor have enabled it to secure a practical monopoly. Only one important opponent remains. The Foil Company by agreement, and at profitable prices, supplies other members of the combination, who together utilize much the larger part of the total domestic production. It may, therefore, when desirable (and this has happened), put any excess production upon the market at prices which no

competitor can meet. It now has over 75 per cent of the trade and, if present tendencies are not arrested, a larger proportion will inevitably and quickly fall into its hands.

The British-American Company has acquired all going domestic concerns of consequence formerly largely engaged in exporting manufactured tobacco and has a monopoly of that commerce—it controls practically all.

The American Tobacco Company necessarily has a monopoly if a subsidiary does; and through control of others it has a general monopoly of the trade.

Where a corporation has an unlawful monopoly which can not be destroyed by severing the original parts, the effective relief is either to enjoin it from doing interstate and foreign commerce or to appoint a receiver with direction to restore competitive conditions.

* * *

Various objections have been offered to the Government's position concerning monopoly. It is said that defendants have competition—even compete with each other; that monopoly can not result from the consolidation or acquisitions of competing properties; that the Sherman law was intended to foster competition, and therefore no monopoly can exist unless built up through means not permissible at common law; that monopoly involves more than ownership—others must be excluded from trade through some illegal act.

Replies to these suggestions have already been indicated. We are concerned with the case before

the Court, not an imaginary one; to attempt the solution of all the vexed questions relating to monopoly is not our task.

The evidence discloses beyond reasonable question that defendants, acting in combination and unison, have acquired dominion over interstate trade in tobacco and power to fix prices. The opinions of Judges Cox and Noyes on this point are convincing.

Monopoly is a practical conception, and if the requisite unification and power are secured through the form of consolidations and acquisitions it is no less real and often is much more effective than when resulting from a simple agreement, as all admit it may be. The right to make a simple contract is surely as sacred as the right to enter into the complex ones involved in corporate relations, consolidations, etc.; and all are subordinate to congressional power to regulate commerce.

It may be admitted that the idea of monopoly involves something more than mere ownership and that the Sherman Act was intended to foster competition. But it does not follow that individuals combined in corporate form can not acquire a monopoly through means of acquisitions, or that thereby they may lawfully destroy all competition and secure complete dominion for themselves. Congress, in the Sherman Act, has ordered the highways of interstate commerce to be kept free of monopolies. When one is found there, the courts' duty is to demolish it; and whether it was built up by means themselves violations of common law or State statutes is beside

the question. The well-settled rule at common law is that tendency to monopoly makes contracts or combinations unlawful, and not that the illegality of the monopoly depends on the use of unlawful means in acquiring it. The power of Congress is supreme; within accepted doctrines defendants have a monopoly; and the duty of the court is to demolish it by a decree adjusted to the circumstances.

The fundamental objection to monopoly rests on both political and economic considerations and is because of the acquired power, not because of mere unlawful steps in the progress of securing it. *Morris Run Coal Co.* v. *Barclay*, 68 Penn., 186.

But if acts unlawful in themselves are requisite, the record discloses them in abundance. All the monopolies complained of were secured through combinations in restraint of trade expressly denounced by the first section of the Sherman Act.

6. *The decree should have described certain general methods followed by defendants in carrying out their unlawful purposes and prohibited them from restraining or monopolizing commerce through these or similar ones.*

These general methods were: (a) By combining ownership and control of plants, assets, and businesses of competitors in a corporation specially organized for that purpose, which thereupon acquired the plants, assets, and businesses of persons, firms, and corporations theretofore in competition, taking from them agreements not to engage in the business; (b) by causing a going corporation to secure conveyances

of plants, assets, and businesses of those formerly competing with it, taking from them agreements not to engage in the business; (c) by causing a corporation to acquire ownership of stock in other corporations competing with it and with each other, taking from the principal owners agreements not to engage in the business, and having acquired the same, to exercise the powers and rights incident thereto; and (d) by agreements assigning specified territory to one party to be exploited without competition from others, as in the English contracts.

7. *The decree should have specified all shares owned by each defendant corporation as disclosed by the evidence (whether alleged in the petition or not); and should have enjoined the holders from exercising control, etc., over the issuing corporations, and the latter, if defendants, from permitting such control.*

The technical rules of equity pleading and practice should not be strictly applied in proceedings under the Sherman Act where the especial purpose is expeditious relief. *Swift & Co.* v. *United States.* Changes in stock ownership easily occur and it may be impracticable to ascertain the exact relationships in a world-wide combination before filing a petition. The remedy should be applied to conditions disclosed by the evidence, when possible without injustice. Government's Exhibit 87 (R. V) reveals the relationship amongst the corporations.

The British-American Company holds shares in the Amsterdam Supply Co., David Dunlop (Inc.), W. S. Mathews & Sons and T. C. Williams Company, all

defendants (Ex. 87, R. V). This should have been recited in paragraph "Fourth" of the decree (R. I, 332) and the consequent injunction (R. I, 333) made to apply.

The Havana Tobacco Company holds shares in defendant, the Amsterdam Supply Company, and in the following, not defendants: H. de Cabanas y Carbajal; H. Clay & Bock & Co. (Ltd.); Cuban Tobacco Co.; Havana Commercial Co.; Havana Cigar & Tobacco Factories (Ltd); and J. S. Murias y Co. This should have been recited in paragraph "Fourth" of the decree and the injunction made to apply.

In addition to those enumerated as held by The American Tobacco Company in paragraph "Fourth" of the decree (R. I, 332), it holds shares in defendant corporations, Imperial Tobacco Company, British-American Tobacco Company, United Cigar Stores Company, and the following companies not defendants: American Machine & Foundry Co.; Acker, Merrall & Condit Co.; Butler-Butler (Inc.); The Reynolds Tobacco Co.; Standard Tobacco Stemmer Co.; and Star Tobacco Co. (Ex. 87, R. V). These should have been included in the recitals and in the consequent injunction.

8. *The decree should have enjoined defendant corporations holding shares of others from collecting dividends thereon.*

For some unexplained reason the court below refused the Government's express request to incorporate this provision. The decree in the Northern Securities

Case, approved by this Court, contained it; and we submit conditions here demand the same thing.

9. *The decree improperly provided that nothing therein should prevent defendants from prosecuting or defending suits; also improperly suspended the injunction pending appeal.*

The Court should not have undertaken to prescribe the effect of the decree in other proceedings. The defendants are willful transgressors, should be so treated everywhere, and certainly should not be shielded.

The injunction should have issued—the object of the statute is prompt relief. While the injury already done can not now be cured, disapproval of the course pursued may prevent repetition of the error.

The defendants, in violation of law, for many years and with great success, have persisted in destroying competition, obstructing commerce and acquiring monopolies. They have become immensely powerful and only vigorous measures can remove the mischief brought about by them. We submit that the situation imperatively demands a decree which will utterly destroy the unlawful arrangements now existing and prevent any similar ones in the future.

GEORGE W. WICKERSHAM,
Attorney General.

J. C. MCREYNOLDS,
Special Assistant to the Attorney General.

DECEMBER, 1910.

Appendix "A."

ACT OF CONGRESS JULY 2, 1890, ENTITLED, "*An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies* (26 Stat., 209)—

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in re-

straint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such tempo-

rary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof), mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, or the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Appendix "B."

WILSON TARIFF ACT OF AUGUST 27, 1894 (28 Stat., 570)—

SEC. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof in any court of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by

imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

SEC. 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 75. That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

SEC. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof), mentioned in section seventy-three of this act, and being in the course of transportation from one State to another, or to or from a Territory, or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 77. That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Appendix "C."

[From Year Book, Department of Agriculture, 1908, p. 680.]

Acreage, production, value, exports and imports of leaf tobacco in the United States, 1900–1908.

Year.	Acreage.	Average yield per acre.	Production.	Average farm price per pound, Dec. 1.	Farm value, Dec. 1.	Domestic exports of unmanufactured, fiscal year beginning July 1.	Imports of unmanufactured, fiscal year beginning July 1.
	Acres.	*Pounds.*	*Pounds.*	*Cents.*	*Dollars.*	*Pounds.*	*Pounds.*
1900...	1,046,427	778.0	814,345,341	6.6	53,661,132	315,787,782	26,851,253
1901...	1,039,190	788.0	818,953,373	7.1	58,283,108	301,007,365	29,428,837
1902...	1,030,734	797.3	821,823,963	7.0	57,563,510	368,184,084	34,016,956
1903...	1,037,735	786.3	815,972,425	6.8	55,514,627	311,971,831	31,162,636
1904...	806,409	819.0	660,460,739	8.1	53,382,959	334,302,091	33,288,387
1905...	776,112	815.6	633,033,719	8.5	53,519,068	312,227,202	41,125,970
1906...	796,009	857.2	682,428,530	10.0	68,232,647	340,742,864	40,898,807
1907...	820,800	850.5	698,126,000	10.2	71,411,000	330,812,658	35,005,131
1908...	875,425	820.2	718,061,380	10.3	74,130,185	.....	.....

Appendix "D."

[From Year Book, Department of Agriculture, 1907, p. 675.]

Acreage, production, and value, by States, of leaf tobacco grown in the United States, 1907.

State or Territory.	Acreage.	Average yield per acre.	Production.	Average farm price Dec. 1.[a]	Farm value Dec. 1.[a]
New Hampshire	100	1,650	165,000	12.0	$20,000
Vermont	200	1,625	325,000	12.0	39,000
Massachusetts	4,700	1,525	7,167,500	11.0	788,000
Connecticut	14,400	1,510	21,774,000	11.5	2,501,000
New York	7,100	1,150	8,165,000	6.0	490,000
Pennsylvania	32,000	1,260	40,320,000	7.5	3,024,000
Maryland	25,700	660	16,962,000	6.5	1,103,000
Virginia	98,100	760	74,556,000	10.5	7,828,000
West Virginia	4,800	720	3,456,000	10.0	346,000
North Carolina	161,400	625	100,875,000	11.0	11,096,000
South Carolina	22,300	900	20,070,000	10.7	2,147,000
Georgia	3,700	860	3,182,000	40.0	1,273,000
Florida	7,500	925	6,937,500	45.0	3,122,000
Ohio	67,200	900	60,480,000	8.4	5,080,000
Indiana	15,000	940	14,100,000	9.8	1,382,000
Illinois	1,100	800	880,000	10.0	88,000
Wisconsin	35,100	1,100	38,610,000	6.5	2,510,000
Missouri	1,500	825	1,237,500	11.0	136,000
Kentucky	270,200	890	240,478,000	10.2	24,529,000
Tennessee	46,500	800	37,200,000	9.8	3,646,000
Alabama	600	450	270,000	24.0	65,000
Mississippi	100	475	47,500	30.0	14,000
Louisiana	100	350	35,000	28.0	10,000
Texas	500	700	350,000	30.0	105,000
Arkansas	900	570	513,000	13.5	69,000
United States.	820,800	850.5	698,126,000	10.2	71,411,000

[a] Prices of certain cigar types given in this table were based upon reports made in April, 1908, no market having been established on December 1.

Appendix "E."

[From Year Book, Department of Agriculture—1908, p. 680.]

Acreage, production, and value by States of leaf tobacco grown in the United States in 1908.

States.	Acreage.	Production.	Farm value December 1.
	Acres.	Pounds.	Dollars.
N. Hampshire	99	178,200	24,948
Vermont	200	347,000	45,110
Massachusetts	4,512	7,444,800	1,153,944
Connecticut	13,824	23,224,320	3,948,134
New York	6,177	7,257,975	689,508
Pennsylvania	29,440	39,008,000	4,095,840
Maryland	26,000	18,200,000	1,365,000
Virginia	140,000	114,100,000	10,497,200
West Virginia	6,200	4,650,000	651,000
N. Carolina	200,000	134,000,000	14,070,000
S. Carolina	29,000	25,085,000	2,508,500
Georgia	2,775	2,705,625	946,969
Florida	5,625	5,568,750	1,949,062
Ohio	50,400	33,768,000	3,545,640
Indiana	12,450	8,715,000	1,045,800
Illinois	1,500	1,132,500	96,262
Wisconsin	35,000	39,550,000	3,955,000
Missouri	2,500	2,187,500	273,438
Kentucky	240,000	195,600,000	17,799,600
Tennessee	65,000	52,000,000	4,680,000
Alabama	630	283,500	73,710
Mississippi	100	25,000	6,250
Louisiana	102	86,700	27,744
Texas	3,000	2,400,000	600,000
Arkansas	891	543,510	81,526
United States	875,425	718,061,380	74,130,185

Appendix

Figures from Gov. Ex. 77 showing total output of *Cigarettes* in the United States, 1890–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages.

Year.	Total output for United States.	Total for American Tobacco Co. and subsidiaries.	Percentage.
1890	2,505,167,610	2,453,458,000	97.9
1891	3,137,318,596	2,798,946,500	89.2
1892	3,282,001,283	2,881,797,240	87.8
1893	3,660,755,959	3,031,265,500	82.8
1894	3,620,666,804	2,974,366,250	82.1
1895	4,237,754,453	3,467,074,670	81.8
1896	4,967,444,232	4,063,747,900	81.8
1897	4,631,820,620	3,814,032,640	82.3
1898	4,385,783,897	3,792,284,120	86.4
1899	3,744,975,403	3,489,767,060	93.1
1900	3,258,716,305	2,982,518,585	91.5
1901	2,728,153,697	2,351,695,755	86.2
1902	2,971,360,447	2,326,246,790	78.3
1903	3,366,486,715	2,543,056,750	75.5
1904	3,433,993,422	2,544,658,160	74.1
1905	3,673,727,411	2,805,252,730	76.3
1906	4,511,997,137	3,354,797,800	74.3
1907	5,309,158,177	3,925,506,700	73.9

Note 1.—Prior to 1897 the above figures include little cigars; since 1897 cigarettes only. This must be considered when comparing percentages.

Note 2.—In 1897 Congress authorized the manufacture of tobacco for export (tax free) in "Bonded Manufacturing Warehouses, Class 6." In 1900 and since The American Tobacco Company or the British-American Co. manufactured cigarettes for export in these warehouses. Their outputs are not reported to the Commissioner of Internal Revenue and are not included in the above figures. They are in Appendix "G" *post;* and must be considered when comparing percentages.

Note 3.—The use of cigarettes made from Turkish tobacco has enormously increased in fifteen years and some pioneers in this branch do a large business, especially in New York City.

Appendix "G."

Total exports of *Cigarettes*, 1901–1907, taken from "Commerce and Navigation of the United States;" also *Cigarettes* manufactured in bonded warehouses for export by American Tobacco Company and subsidiaries, as shown by Ex. 84, R. V.

Year.	Total exports from United States.	Total manufacture in bonded warehouses for export by American Tobacco Company and subsidiaries.
1901	(2) 1,052,390,000	(3) 1,004,261,000
1902	1,273,614,000	1,271,317,700
1903	1,456,452,000	1,495,823,400
1904	1,528,406,000	1,899,217,760
1905	1,837,803,000	1,852,919,100
1906	1,710,939,000	1,912,532,900
1907	1,998,095,000	1,805,117,150

Note 1.—Figures showing total exports are taken from "Commerce and Navigation of the United States," 1905, page 727; 1906, p. 752; 1907, p. 768. Figures showing total manufacture in bonded warehouses for export by American Tobacco Company and subsidiaries were furnished by defendants.

Note 2.—Figures for fiscal years ending June 30.

Note 3.—Figures for calendar years.

Appendix "H."

Figures from Gov. Ex. 78 (R. V) showing total output of *Smoking Tobacco* in the United States 1890–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages. The totals are expressed in pounds:

Year.	Total output for United States.	Total for American Tobacco Co. and subsidiaries.	Percentages.
1890	69, 829, 445	5, 466, 619	7. 8
1891	76, 708, 300	10, 371, 877	13. 5
1892	75, 108, 503	16, 331, 320	21. 7
1893	76, 448, 651	16, 363, 552	21. 4
1894	83, 293, 044	17, 106, 907	20. 5
1895	82, 341, 298	18, 527, 839	22. 5
1896	83, 548, 984	17, 294, 015	20. 7
1897	85, 463, 194	20, 648, 114	24. 2
1898	89, 240, 526	23, 962, 914	26. 9
1899	102, 468, 594	55, 466, 554	54. 1
1900	101, 548, 467	62, 130, 835	61. 2
1901	112, 156, 974	68, 187, 535	60. 8
1902	131, 130, 733	87, 550, 618	66. 8
1903	134, 359, 183	89, 757, 663	66. 8
1904	149, 151, 690	101, 463, 889	68
1905	165, 208, 982	111, 231, 133	67. 3
1906	175, 664, 091	123, 026, 237	70
1907	179, 172, 512	127, 638, 531	71. 2

Note 1.—The above figures of manufacture by The American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from annual reports Commissioner of Internal Revenue.

Note 2.—Manufactures for export in bonded warehouses, class 6, are not included, but they are very small.

Appendix "I."

Figures from Gov. Ex. 79 (R. V) showing total output of *Plug* and *Twist* in the United States 1891–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages. The totals are expressed in pounds.

Year.	Total for United States.	Total for American Tobacco Co. and subsidiaries.	Percentages.
1891	166,177,915	4,342,790	02.6
1892	171,081,575	5,931,737	03.5
1893	147,936,380	8,707,192	05.9
1894	160,069,955	8,974,117	05.6
1895	167,798,213	20,805,781	12.4
1896	153,397,907	31,370,491	20.4
1897	185,730,395	38,065,219	20.5
1898	160,876,541	36,134,694	22.5
1899	165,755,390	93,211,157	56.2
1900	173,890,614	109,168,330	62.8
1901	172,498,786	120,441,888	69.8
1902	185,736,781	134,636,727	72.5
1903	182,551,095	138,862,380	76.
1904	172,162,481	126,313,233	73.4
1905	166,953,570	134,049,743	80.3
1906	176,749,800	143,906,868	81.4
1907	172,002,513	137,207,883	79.7

Note 1.—The above figures of manufacture by The American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from reports Commissioner of Internal Revenue.

Note 2.—Manufactures for export in Bonded Warehouses are not included. In 1907 (calendar year) defendants made in such warehouses 4,866,419 pounds. What amount of plug they made outside of bonded warehouses which was exported does not definitely appear; but defendant Harris testified that they make nearly all exported manufactured tobacco products.

Appendix "J."

Figures from Gov. Ex. 80 (R. V), showing total output of *Fine Cut* in the United States 1891–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages. The totals are expressed in pounds.

Year.	Total output for United States.	Total for American Tobacco Co. and subsidiaries.	Percentage.
1891	16, 968, 870	262, 114	01. 5
1892	16, 222, 689	550, 281	03. 4
1893	14, 202, 671	513, 760	03. 6
1894	13, 696, 334	584, 429	04. 3
1895	13, 265, 329	562, 186	04. 2
1896	11, 761, 690	547, 832	04. 7
1897	12, 127, 268	544, 922	04. 5
1898	11, 415, 231	689, 101	06.
1899	11, 687, 838	6, 001, 417	51. 3
1900	11, 462, 797	5, 765, 425	50. 3
1901	11, 722, 314	5, 674, 310	48. 4
1902	12, 065, 617	9, 138, 522	75. 7
1903	11, 893, 051	9, 230, 014	77. 6
1904	12, 151, 003	9, 676, 316	79. 6
1905	11, 684, 184	9, 410, 803	80. 5
1906	12, 742, 345	10, 321, 285	81. 0
1907	12, 457, 917	10, 115, 315	81. 1

Note.—The above figures of the manufacture by The American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from reports of Commissioner of Internal Revenue.

Appendix "K."

Figures from Gov. Ex. 81 (R. V) showing total output of *Little Cigars* in the United States, 1898–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages.

Year.	Total for United States.	Total for American Tobacco Co. and subsidiaries.	Percentage.
1898	456, 826, 384	232, 909, 700	51.
1899	622, 318, 245	409, 932, 660	65. 9
1900	610, 926, 720	382, 043, 700	62. 5
1901	775, 248, 236	555, 263, 740	71. 6
1902	676, 115, 995	512, 740, 310	75. 3
1903	592, 406, 721	422, 564, 755	71. 3
1904	736, 187, 259	586, 642, 960	79. 7
1905	803, 641, 616	630, 405, 800	78. 4
1906	989, 751, 253	804, 425, 670	81. 3
1907	1, 069, 215, 111	954, 001, 460	89. 2

Note.—The above figures of the manufacture by The American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from reports Commissioner of Internal Revenue.

Appendix "L."

Figures from Ex. 82 (R. V) showing total output of *snuff* in the United States 1891–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages. The totals are expressed in pounds.

Year.	Total output for United States.	Total for American Tobacco Co. and subsidiaries.	Percentage.
1891	10,674,241	311,750	02.9
1892	11,426,927	618,718	05.4
1893	11,952,735	457,736	03.8
1894	11,582,838	499,361	04.3
1895	10,887,709	615,857	05.7
1896	12,708,919	715,781	05.7
1897	13,768,455	664,274	04.8
1898	13,607,631	813,560	06.
1899	14,723,392	4,868,850	33.1
1900	13,805,311	9,315,303	67.5
1901	17,513,317	13,930,559	79.5
1902	18,682,341	16,069,899	86.0
1903	21,084,427	18,109,046	85.9
1904	20,489,963	18,666,210	91.1
1905	21,827,374	20,011,538	91.7
1906	23,566,731	22,575,826	95.8
1907	22,960,038	22,067,234	96.1

Note.—The above figures of the manufacture by the American Tobacco Company and subsidiaries were furnished by defendants; those showing total manufacture in the United States are from reports of Commissioner of Internal Revenue.

Appendix "M."

Figures from Gov. Ex. 83 (R. V), showing total output of *Cigars*, *Cheroots*, and *Stogies* (weighing 3 lbs. per thousand or more), in the United States, 1892–1907, subject to tax and reported to Bureau of Internal Revenue; like output for same period by American Tobacco Company and subsidiaries; and percentages.

Year.	Total output for United States.	Total for American Tobacco Co. and subsidiaries.	Percentages.
1892	4,674,708,260	85,560,000	01.8
1893	4,341,240,981	68,335,000	01.6
1894	4,163,641,327	53,035,000	01.3
1895	4,099,137,855	63,297,000	01.5
1896	4,048,463,306	66,318,000	01.6
1897	4,431,050,509	73,711,000	01.7
1898	4,458,836,966	99,241,000	02.2
1899	4,909,566,840	169,239,844	03.4
1900	5,565,669,701	307,751,296	05.5
1901	6,139,390,776	591,524,152	09.6
1902	6,231,714,558	989,908,977	15.8
1903	6,806,017,429	1,101,476,738	16.2
1904	6,640,482,483	906,938,130	13.7
1905	6,747,869,277	948,675,957	14.1
1906	7,147,548,312	1,051,558,221	14.7
1907	7,353,221,840	1,039,822,996	14.1

Note.—The above figures of the manufacture by The American Tobacco Company and subsidiaries were furnished by The American Tobacco Company; those showing total manufacture in the United States are from reports of Commissioner of Internal Revenue.

Appendix "N."

[From Report Bureau of Corporations to the Senate on price of tobacco, June 5, 1909, p. 21.]

Combined income of the various companies in the Tobacco Combination (excluding duplications), 1890–1907.

Year.	American, Continental, and Lorillard companies.			American Snuff Company.	American Cigar Company.[2]	Grand total.
	Earnings of own business.[1]	Earnings of principal subsidiary companies.	Dividends and interest from companies not covered by preceding.			
1890	$2,511,180.12					$2,511,180.12
1891	4,396,794.93					4,396,794.93
1892	4,739,301.65					4,739,301.65
1893	4,334,467.34					4,334,467.34
1894	5,065,493.61		$3,922.36			5,069,415.97
1895	3,917,908.78		53,612.77			3,971,521.55
1896	3,412,899.97		180,297.02			3,593,196.99
1897	3,996,115.21		183,345.45			4,179,460.66
1898	3,584,785.51		232,983.29			3,817,768.80
1899	6,473,726.65	$235,215.79	495,608.48			7,204,550.92
1900	9,218,273.64	683,237.64	296,943.39	$531,667.92		10,730,122.59
1901	12,310,072.20	1,524,860.89	321,925.00	1,066,605.31	$157,259.65	15,380,723.05
1902	15,744,700.21	2,470,699.59	1,129,374.73	1,739,616.84	[3] 3,055,251.44	18,029,139.93
1903	18,815,116.93	3,278,500.73	1,506,064.92	2,177,827.75	[3] 1,228,232.40	24,549,277.93
1904	16,229,579.36	4,905,610.18	1,912,885.53	2,458,419.37	460,329.54	25,966,823.98
1905	18,347,881.30	5,715,046.58	2,820,300.07	3,232,809.70	1,330,225.27	31,446,262.92
1906	20,856,677.48	6,638,629.75	2,333,496.41	3,808,333.62	3,082,378.86	36,719,516.12
1907	19,246,729.78	8,151,145.06	2,776,133.71	3,539,048.92	2,287,098.28	36,000,155.75

[1] Excluding business of American and Continental Tobacco companies as agents of the American Cigar Company for years 1902 to 1905, inclusive.

[2] Including business of American and Continental Tobacco companies as agents of the American Cigar Company for years 1902 to 1905, inclusive.

[3] Loss.

Appendix "O."

[From Report Bureau of Corporations to the Senate on prices of tobacco, June 5, 1909, p. 27.]

American, Continental, and Lorillard companies—Separation of domestic from export profits.

Year.	Total Profits.			Distribution.		
	Total income from own business.	Miscellaneous profits or losses.	Departmental profits.	Domestic profits distributed to individual departments.	Export profits.	Amounts undistributed.
1890	$2,511,180.12	$1,110.57	$2,510,069.55			
1891	4,396,794.93	2,060.37	4,394,734.56			
1892	4,739,301.65	4,759.29	4,734,542.36			
1893	4,334,467.34	16,550.82	4,317,916.52		$514,160.41	
1894	5,065,493.61	17,261.56	5,048,232.05		487,255.07	
1895	3,917,908.78	15,208.18	3,902,700.60	$3,412,061.45	545,132.40	*154,493.25
1896	3,412,899.97	*162,972.49	3,575,872.46	2,822,478.80	824,101.95	*71,708.35
1897	3,906,115.21		3,906,115.21	3,207,022.97	811,344.95	*22,252.71
1898	3,564,785.51		3,564,785.51	2,664,191.64	1,010,233.15	*89,639.28
1899	6,473,726.65	100,079.66	6,373,646.99	5,122,970.99	914,407.35	336,268.65
1900	9,218,273.64	35,133.42	*9,183,140.22	8,486,966.57	685,090.58	11,083.06
1901	12,310,072.20	36,933.65	12,273,138.55	11,779,024.65	652,119.81	*158,005.91
1902	15,744,700.21	27,037.23	15,717,662.98	15,587,866.27	37,727.50	167,534.21
1903	18,815,116.93	45,136.64	18,769,980.29	18,735,888.85	2,706.59	26,798.03
1904	16,229,579.36	148,496.08	16,081,083.28	16,007,402.49		73,680.79
1905	18,347,881.30	458,079.19	17,889,802.11	17,913,829.59	1,305.11	*22,722.37
1906	20,856,677.48	171,604.86	20,685,072.62	20,641,708.06	341.08	43,023.53
1907	19,246,729.78	233,424.90	19,013,304.88	19,025,726.27	170.24	*12,591.63

*Loss.

Appendix "P."

[From Report of Bureau of Corporations to the Senate on prices of tobacco, June 5, 1909, p. 43.]

Average prices and profits, by departments, of the Tobacco Combination (domestic business).

[American Cigar and American Snuff companies not included.]

Year.	Smoking (per pound).		Plug (per pound).		Fine cut (per pound).	
	Price, less tax.	Profit.	Price, less tax.	Profit.	Price, less tax.	Profit.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
1895	25.0	3.2	15.5	[2]4.4	27.0	4.3
1896	24.7	4.4	12.9	[2]4.4	27.2	3.6
1897	23.7	4.6	12.2	[2]2.4	26.6	5.5
1898	23.6	3.2	16.7	[2]2.8	25.9	[2].9
1899	21.1	2.8	24.9	1.9	24.4	1.8
1900	22.8	4.5	22.8	3.7	23.0	[2].7
1901	24.5	5.8	25.2	6.4	26.3	[2]1.9
1902	26.7	6.8	27.7	8.3	33.4	6.4
1903	27.9	6.2	29.4	9.8	29.4	5.8
1904	29.4	7.1	30.0	8.0	30.8	6.2
1905	28.4	8.3	30.2	8.1	30.6	6.7
1906	29.3	9.0	30.1	9.1	29.9	6.6
1907	30.1	9.3	30.4	8.7	30.0	5.3

Year.	Scrap (per pound).		Cigarettes (per thousand).[1]		Little cigars (per thousand).	
	Price, less tax.	Profit.	Price, less tax.	Profit.	Price, less tax.	Profit.
	Cents.	*Cents.*				
1895	.....	.....	$2.77	$1.22	$4.60	$0.43
1896	.....	.....	2.46	1.06	4.43	.41
1897	.....	.....	2.27	1.00	3.96	.67
1898	.....	.....	2.02	1.05	3.68	.43
1899	.....	.....	2.01	1.05	3.27	.07
1900	.....	.....	2.09	1.05	3.19	.32
1901	13.2	.4	2.12	.97	3.34	.63
1902	15.2	[2].3	2.29	.72	4.37	.20
1903	17.7	3.9	2.27	1.04	4.33	.39
1904	18.0	1.5	2.25	.91	3.91	.72
1905	17.7	.3	2.17	.89	3.59	.92
1906	18.0	[2]2.7	2.15	.85	3.60	.69
1907	18.5	[2]1.5	2.20	.71	3.60	.56

[1] American Tobacco Company only.

[2] Loss.

Appendix "Q."

[From Report of Bureau of Corporations to the Senate, June 5, 1909, page 29.]

American, Continental, and Lorillard companies—Net value of sales and proportion represented by tax, cost, and profit, respectively (domestic business).

Year.	Amount represented by—				Proportion represented by—		
	Net value of sales.	Tax.	Cost.	Profit.	Tax.	Cost.	Profit.
					Per ct.	*Per ct.*	*Per ct.*
1895	$21,120,561.70	$4,071,055.14	$13,637,445.11	$3,412,061.45	19.3	64.6	16.1
1896	22,235,508.62	4,786,115.76	14,625,914.00	2,823,478.86	21.5	65.8	12.7
1897	23,485,333.81	5,859,836.87	14,418,463.97	3,207,032.97	24.9	61.4	13.7
1898	26,923,627.35	8,674,345.07	15,585,090.64	2,664,191.64	32.2	57.9	9.9
1899	61,920,705.44	21,582,820.74	35,214,913.71	5,122,970.99	34.8	56.9	8.3
1900	67,589,568.18	23,856,691.80	35,245,909.81	8,486,966.57	35.3	52.1	12.6
1901	67,147,552.13	20,737,075.29	34,631,452.19	11,779,024.65	30.9	51.6	17.5
1902	71,786,348.15	16,222,318.27	39,976,163.61	15,587,866.27	22.6	55.7	21.7
1903	71,704,514.23	12,962,499.45	40,006,125.93	18,735,888.85	18.1	55.8	26.1
1904	69,981,891.92	12,374,293.68	41,600,195.75	16,007,402.49	17.7	59.4	22.9
1905	73,261,513.01	12,992,612.42	42,355,071.00	17,913,829.59	17.7	57.8	24.5
1906	80,050,489.98	14,285,733.43	45,123,048.49	20,641,708.06	17.8	56.4	25.8
1907	79,604,641.91	14,557,284.72	46,021,630.92	19,025,726.27	18.3	57.8	23.9

O

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
THE AMERICAN TOBACCO COMPANY ET AL., APPELLEES, } No. 118.

THE AMERICAN TOBACCO COMPANY ET AL., APPELLANTS.
v.
THE UNITED STATES OF AMERICA, APPELLEE. } No. 119.

CONCLUDING ARGUMENT OF THE ATTORNEY GENERAL ON BEHALF OF THE UNITED STATES.

THURSDAY, JANUARY 12, 1911.

Mr. WICKERSHAM. May it please the court: In the Danbury hat case (the case of *Loewe* v. *Lawlor*), the court stated that its conclusion in that case

"rests on many judgments of this court to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts in that regard the liberty of a trader to engage in business."

As I conceive this case, the first consideration to which the attention of counsel should be addressed is whether or not the facts of this record bring it within the principle enunciated in that case.

In the fifth volume of the record there is an exhibit (Exhibit 87) which, in a brief and comprehensive way, shows the combination of the corporations which are the defendants in this suit. There are 64 corporations in number; and they are all directly or indirectly controlled by the American Tobacco Company, with the single exception of the Imperial Tobacco Company of Great Britain.

There are 25 individual defendants who were dismissed from the suit by the court below, who together controlled very much more than one-half of the common stock (which has the voting right) of the

American Tobacco Company, 8 of whom, as it appears, themselves control and have controlled, certainly since the date of the consolidation in 1894 (or whatever the date was), the voting stock of that combination.

Annexed to the petition are four agreements, which have been the subject of considerable discussion here, which on the one hand are contended by the defendants to constitute nothing but simple sales of property, buttressed by the customary covenants against injury by vendors, and on the other hand are contended by the Government to be evidence of the character of the combination, to constitute in themselves a parceling out (so far as the defendants in this case were able to do it) of the business of the world in tobacco and products of tobacco into three equal parts, and (so far as was within the capacity of the defendants in this suit and of the officers and directors of the companies which were the principal parties to those agreements) effectually and forever restrained any competition whatever between the concerns dealing in England and the concerns dealing in the United States, and apportioned among themselves the commerce with the rest of the world, except so far as the governments of different countries in the world had themselves, by govermental monopoly, appropriated to themselves the business of those countries.

The financial statement of the American Tobacco Company, which is the fifty-first exhibit in the record, in the fifth volume, shows that at the date when this case was being tried the assets of the American Tobacco Company and its constituent subsidiary companies, excluding the Imperial, amounted to about $400,000,000, according to book values. The table in the record shows that their net earnings for the year 1907 amounted to about $36,000,000. And it was stated yesterday by Mr. Nicoll in the argument that after paying interest on the bonds and the agreed 7 per cent or 6 per cent on the preferred stock, dividends of 20 per cent had been declared on the common stock. It appears, moreover, that for the year 1906 the companies defendant, exclusive always of the Imperial Tobacco Company, had transacted the following percentages of all the business of the United States in these products of tobacco:

Of manufactured tobacco, plug and smoking, 77 per cent.

Of snuff, 96 per cent.

Of cigarettes, 77 per cent.

Of little cigars, 91 per cent.

Of cigars, stogies, etc., according to the table, upward of 10 per cent. And I believe the evidence elsewhere shows it more accurately as nearer 14 per cent.

It appears, moreover, from Government Exhibit 76, in the fifth volume of the record, that in the year 1905 these companies purchased about 45 per cent of the entire crop of American leaf tobacco of all

kinds; about 60 per cent of the flue-cured tobacco of Virgina, North Carolina, and South Carolina; about 90 per cent of the Virginia sun-cured tobacco; nearly 72 per cent of the burley tobacco, and 60 per cent of the Green River tobacco.

The defendants maintain that their trade for the year 1906 amounted to only about 37½ per cent of the total output of all manufactures of tobacco in the United States; and in reaching that result they include the trade in cigars, of which admittedly they do not control more than 14 per cent.

Taking their own figures and eliminating the cigar business, their business for the year 1906 amounted to $159,878,934, out of a total output for the United States of $207,935,822, or upward of 76 per cent.

The contention of the defendants is that they are not in violation of the statute because they are merely manufacturing companies, owning their respective properties, having grown, expanded, and prospered through sound business methods in the ordinary course of successful trade, and not pursuant to a design to suppress competition or to accomplish monopoly. They lay much stress upon the contention that the American Tobacco Company is not a holding company, which Mr. Johnson defines to be not one which acquires property or shares for the purpose of issuing the same in the promotion of its trade; but it is a corporation which, having no trade, acquires shares (for it can not acquire property) for the purpose of holding them for something not involved in the transaction of its business.

Mr. Johnson's contention amounts to this: That if in this case a number of different corporations competing with each other enter into an agreement restricting output, regulating prices, and engaging not to compete, they violate the law; but if, instead of entering into such an agreement, one of them acquires the stocks of all the others, or if they be merged or consolidated into one corporation under the authority of law so that they unify their management and control under a form of organization permitted by State law, they do not violate the Sherman Act, even though the necessary effect of their combination is to terminate an active competition which theretofore existed between them, and to give them so large a proportion of the trade and commerce of the United States in the article dealt in as to enable them to fix prices and exclude competition.

He concedes that the words of the statute forbidding combinations in the form of trust or otherwise give a pretty large limit or scope. But he says, as to the words "or otherwise:"

"did not that mean in that form which put the properties of various corporations or individuals under a joint control or domination? And did it mean that control which followed the acquisition of property by any man in a legitimate way?"

Before answering this question, it is pertinent to inquire whether or not the control in this case which followed the acquisition by the American Tobacco Company of the stocks of the very many companies and of the properties and businesses of the concerns absorbed by it is to be considered an acquisition of property in a legitimate way, such as might have been the case with any acquisition of property by any individual; or whether the case does not present very different elements, such as attend the making of contracts in restraint of trade and efforts at monopoly.

All four of the circuit judges in the court below wrote opinions in this case. My learned friends have referred a number of times to the "opinion of the court," and have read from the "opinion of the court." That opinion was the opinion of the presiding judge of the court, whose view of the law was not concurred in by any of his associates. Judge Coxe, in his opinion, described the combination among the defendants in the following language (I read from pages 295 and 296 of volume 1 of the record):

"The Tobacco Trust, so called, consists of over 60 corporations, which, since January, 1890, have been united into a gigantic combination which controls a greatly preponderating proportion of the tobacco business in the United States in each and all its branches, in some branches the volume being as high as 95 per cent. Prior to their absorption many of these corporations had been active competitors in interstate and foreign commerce. They competed in purchasing raw materials, in manufacturing, in jobbing, and in selling to the consumer. To-day those plants which have not been closed are, with one or two exceptions, under the absolute domination of the supreme central authority. Everything directly or indirectly connected with the manufacture and sale of tobacco products, including the ingredients, the packages, the bags and boxes, are largely controlled by it. Should a party with moderate capital desire to enter the field, it would be difficult to do so against the opposition of this combination. That many of the associated corporations were not coerced into joining the combination, but entered of their own volition, is quite true, but in many other instances it is evident that if not actually compelled to join they preferred to do so rather than face an unequal trade war in which the odds were all against them and in which success could only be achieved by a ruinous expenditure of time and money.

"The power to destroy a too formidable rival, assuming that the allied companies see fit to exercise it, can hardly be denied.

"We are not dealing with these companies as they existed prior to 1890, but with the consolidated unit controlling a preponderating proportion of the tobacco business in its most minute details. Prior to that date the manufacturing companies, the purchasers, the distributors, and the selling companies were each and all operating independently, and tobacco products were being transported back and forth to every State of the Union and to foreign countries. Since 1890 this vast interstate and foreign trade which was formerly carried on by this large number of competing companies and individuals

is now carried on by one combination. The free interchange of commerce has been interfered with, hampered, diverted, and, in some instances, destroyed. Though it may be greater in volume, it does not flow through the old channels. It is not free and unrestrained."

Judge Noyes said:

"The testimony discloses that the business of the defendants has three broad phases:

"(1) The purchase of the raw materials and supplies.

"(2) The manufacture of the product.

"(3) The disposition of the product.

"While the second phase—that of manufacture—does not involve interstate commerce, the other two phases seem clearly to directly involve it. And it also seems clear that the three phases are of equal importance. Unlike a mere manufacturing combination, this combination relates quite as much to the purchase of materials and the disposition of the product as to manufacture."

This combination had its origin in the year 1890, as has been stated here on the argument before; and in considering this problem I think it is important to bear in mind precisely how it was brought about.

There were five independent competing concerns. They were in different States. Three of them were corporations, and two of them were partnerships. They did an interstate business. The facts are conceded. They are embodied in the stipulation, in which are found most of the material facts regarding the structure of the combination, and not having regard to the questions of intent and purpose and action.

They were in fierce competition with each other. During the last year before the combination they had expended a very large amount of money and had lost a large amount of money in maintaining that competition. They came together in the month of January, 1890, and at once, by force of that combination, extinguished the preexisting competition between them, and at once secured 96 per cent of the entire business of the United States in cigarettes.

The dominant purpose of that combination may be misrepresented, but it can not be mistaken. Dictated, of course, by counsels of prudence (because the members of the combination undoubtedly considered that it was more to their interest to terminate a destructive competition than to fight it out), the purpose of the combination was undoubtedly to end that competition; and the purpose undoubtedly was by taking into the combination all of those who were engaged in the business to secure a monopoly of the business. And the purpose was carried out.

In their brief the defendants lay great stress upon the contention that these gentlemen did not go into this combination for the purpose of creating a monopoly or restraining trade, but that they went in simply to protect themselves against competition. It seems to me that by that very contention they admit themselves out of court;

because they characterize their acts by precisely the intent and purpose which this court in construing the Sherman Act has many times said in its decisions was an unlawful purpose. When the Sherman Act was passed six months later it found this combination in the possession of the entire cigarette business of the United States; because the 3 or 4 per cent was a negligible quantity. All competition was terminated. The only difference between that and any other combination was that it was held together through the form of a New Jersey charter, instead of by an agreement *inter partes*. And if any evidence is required as to the purpose with which they entered into the combination, it is furnished by the evidence of their continued acts.

They proceeded from that beginning to go out into other lines of the tobacco business. They went into the plug-tobacco business. They lay much stress upon the fact that they never had control of the Continental Tobacco Company, which was the great plug-tobacco company. But that becomes wholly immaterial; for within a very few years after this beginning it was admittedly merged by a process of law with the American and the Consolidated Tobacco companies; and if they had no control before, they all became part of a unit then.

They lay much stress upon the fact that they never had control of the American Snuff Company. But that is a matter of very little importance; because the record shows that directly or through the ownership of the Lorillard Tobacco Company they had about 40 per cent of the stock of the American Snuff Company. Four of the directors of the American Tobacco Company were stockholders of record of an additional amount sufficient to bring that ownership up to 45½ per cent. And the record shows that they have always operated in perfect harmony with each other.

But they say this with respect to the acquisition of future companies—which, by the way, went on as a continued process as it widened out, taking in new lines, following a very intelligent and a very scientific method. With every purchase they would get not only the business which they particularly sought in making the purchase, but the little nucleus of new business. Having gotten the cigarette business, there came with it a certain amount of plug-tobacco business; and so they proceeded to buy other plug-tobacco companies. Then they created a corporation to do the plug-tobacco business, and they put into that corporation all of the companies dealing especially in plug tobacco. With that they got a little of the snuff business. Then they created a company which brought together all the snuff manufacturers. And so it went, widening out, over and over.

They say there is no competition between the different forms of tobacco—between the different kinds of commerce in tobacco. But that is obviously not so. There is competition. You can not go into

one kind of tobacco, as this whole record shows, without going into another. The only form of tobacco product that they have not yet succeeded in absorbing to themselves is the cigar business; and that is because the manufacture of cigars does not lend itself to factory methods. Anybody may buy leaf tobacco and make cigars with the dexterity of his fingers. And with all of their efforts they have never been able to get more than 14 per cent of the entire business of the United States in cigars.

Of course, they control the business in Cuba. But the average American citizen does not smoke Habana cigars to any great extent. Therefore the cheap cigar which is made out of American leaf is made by so many other people, and may be made by so many other people, that they have been unable to get control of that business.

In this process of getting control of companies they refer (and I will only pause to speak of one or two instances) to the case of the R. J. Reynolds Tobacco Company as a typical instance of the class of cases in which some one of the defendant corporations owns stock in some other. In this instance Reynolds and his associates owned one-third, and the other two-thirds were taken by the Continental Tobacco Company, now the American Tobacco Company. The evidence shows that the American Tobacco Company had acquired an interest in the Reynolds Tobacco Company, of Bristol, Tenn. P. S. Hill, one of the vice presidents of the American Tobacco Company, negotiated the purchase with Dulaney, representing the Reynolds Company. The connection of the American Tobacco Company with the Reynolds Company was not made public. Hill testified that "it was a very trivial transaction and a very foolish one." Perhaps this is why the defendants in their brief are so anxious to demonstrate that it was a typical instance.

Its capital stock was only $7,500,000. It owned two brands, known as May Queen and Bristol Club. A series of letters that passed between Dulaney and Hill (which were produced on Hill's direct examination and are found in the second volume of the record, from page 316 to page 319) show just how the American Tobacco Company went about using secretly acquired and secretly controlled companies for the purpose of advancing their own ends and destroying their competitors.

Dulaney's letter to Hill of September 21, 1903——

Mr. McREYNOLDS. Pardon me; there are two Reynolds companies. The R. J. Reynolds Company is the one with seven and a half million dollars of capital. The other was a smaller company.

Mr. WICKERSHAM. I am much obliged for your calling my attention to it.

Dulaney's letter to Hill of September 21, 1903, is found on page 319 of volume 2, and that I read on the previous argument of this

case. It shows his condition of mind when he finally realized the plight into which he had been put by becoming the secret agent of this undisclosed principal. I read it on the previous argument, and I think it will bear rereading now.

He says:

"Until the receipt of your letter of the 16th instant I had refused to entertain any suggestion to the effect that you have not been treating our company fairly, and I still regret very much to be forced to believe it.

"You complain of not being able to see me, when you certainly know that when I was in New York, a week or so ago, I visited your office three days consecutively, and on one day waited all the forenoon, without being able to see you; and there was no fact in connection with our sale to you more clearly set out than that I could not and would not give this business any considerable part of my time. And yet I have been forced to give it much more thought and attention than ever before; and if I understand your position now toward us, we are simply in the attitude of a prisoner in chains with mock instructions to do the impossible.

"You promised to buy our leaf and furnish it to us at the same price you do to the A. T. Co.—at cost and carriage. But the two shipments made us have been of such quality and price as to offer no encouragement.

"You promised us an open market for our product—that you would remove all opposition to our brands by your salesmen and the distributing houses with whom you had influence; but you have not done this.

"In Greater New York and New Jersey we had a good business, which has been taken away from us by the argument that May Queen had been bought by the trust and would soon be taken off the market.

"In Baltimore and Washington your salesmen have not ceased to intimidate the distributors, and have run us out by threats that 'houses which handled May Queen could not get the benefit of the trust's trade discounts,' and this same method has been practiced at many other places.

"Such tactics are like abusing a prisoner and would not be tolerated by the military regulations of any civilized country."

Hill's only comment on that letter was:

"Mr. Dulaney, not being very much in touch with the business, got reports which were absolutely unfounded, and which he has always admitted since were incorrect."

On cross-examination, however, it was shown that Dulaney was very much in touch with the business.

On page 387 of volume 2 Mr. Hill was asked:

"Q. During this time, Mr. Hill, that the Reynolds Company were running under separate management, what was the nature in general of your correspondence with them—I mean, what was the extent of it; was it information, advice, direction, etc.?

"A. I was advised as to their output, the quantity and the results of their operations each month, and Mr. Dulaney would call and discuss generally the details about the business; sometimes write and

call attention to some things that he wanted done, and I had no connection with it other than that I was entirely willing to do anything I could for them."

And he goes on to show how finally he and Mr. Dulaney got pretty well discouraged; and eventually they made a bargain with Dulaney, representing the minority stockholders, by which they sold out the tangible assets and agreed to pay the stockholders a royalty on the brands. Since that time, he says, there has been no concealment as to who is the manufacturer of May Queen.

Not only did that sort of thing occur in their control of the various forms of business with which they were brought in contact from time to time as they progressed and as they prospered and as they got more and more control of the market in different lines, but they got control of the entire business in licorice, they got control of the entire business in tin foil, they went into all of the various forms of collateral business to which your attention has been called. Every one of those acquisitions terminated a competition theretofore existing in the particular commodity between all of the companies which had been taken into the American Tobacco Company fold. The acquisitions were made for the purpose of terminating that competition, and of enabling them to get the product dealt in by that particular company at the lowest possible price.

This was no simple, normal growth of business by direct acquisition of property, as has been depicted here. It was the progress of a combination operating through various forms of corporate organization and intercorporate stock and bond holdings, all designed to secure (and accomplishing that design) the control of a great business, and to destroy all competition, by purchase, consolidation, or merger.

Their growth was accomplished by different methods—some direct and aboveboard; others indirect, subtle, and in some cases such as would scarcely pass muster. It was an aggregation of competing plants. It was precisely such an aggregation as every public man who ever advocated the passage of the Sherman law, and every legislator who voted for it, had in mind when the act was passed. It operated for the purpose of removing all competition, and it achieved this purpose by different methods.

Mr. Duke's idea of the way to destroy competition is shown in a letter written by P. S. Hill to J. B. Cobb (the president of the American Cigar Company), printed on page 257 of the second volume of the record. Mr. Duke was the dominant factor in the combination, and his ideas had the force of law.

As written by Mr. Hill, the vice president of the American Tobacco Company:

"Mr. Duke's idea is to make a confidential arrangement with the Messrs. Park & Tilford and Acker, Merrall & Condit by which they

will sell Habana cigars both to the consumer and the retailer at present cost, so that the retailer will be paying exactly the same price as the consumer. Of course it will be necessary to keep this matter entirely confidential. The result will be a demoralization of the business for such length of time as may be deemed desirable to continue on this basis. The final upshot will be that the importers will be forced into an arrangement by which they will maintain prices agreed upon. This plan is considered the more desirable at this time for the reason that if we try to regulate the profit at the present time it would mean an advance in our goods to both wholesaler and retailer, which would give a decided advantage to independent factories in securing business, but we feel that when our goods are sold to the consumer at present cost there will be no opportunity to get much business for independent factories."

In every purchase they made (I think I speak within bounds), except the original combination, which they call "a purchase," they took from the vendors (not simply from the corporate vendor, but from the individuals who were its principal officers and shareholders), not simply covenants to protect the business sold, but covenants against engaging in the tobacco business throughout the United States, with perhaps the State of Nevada eliminated. It was their settled policy. When they came to make the combination in England, they took the most comprehensive covenants from all the individuals who had composed the various concerns that went into the Imperial Company—a number of people by the name of Wills, who had an old-established business there, and everybody else concerned. And all of the gentlemen who dominated the company here—those who were the owners, and had been from the start in control of the corporation—gave their individual covenants not to in any way engage in the tobacco business in competition with the covenantee.

Another method resorted to many times was to acquire the control of supposedly independent companies, and through them to cut prices and demoralize the market.

Twenty of these secretly controlled companies were developed in the evidence, and their names appear in the record. The effect of the discovery that a supposedly independent company was really one of the tentacles of the "trust" is graphically described in a letter of John Middleton, of the Nall & Williams Company, to C. C. Dula, printed on page 556 of the second volume of the record. He says:

"My Dear Sir: The inclosed letter will explain itself. I don't know this gentleman, but presume it is all right."

The inference from the letter would be that somebody had been sent with a letter of instructions to be permitted to examine the books and accounts.

"I have written him that the books were ready whenever he was. I am anxious to have the books examined and Mr. West is even more anxious than I am, but it comes at rather an unfortunate time for this

reason. The whole outfit is like a swarm of bees, and you can beat the tin pan all you please and you can not settle them, from the office force to the traveling men, and the hands in the factory, there is not one of them who does not believe that this establishment is going to be closed up. This is not to be surprised at, as they all know that in the past when the A. T. Company purchased a plant, it was closed, hence there is unrest through the entire establishment. I would like this examination to be done as quickly as possible when it is once started, for the examination will again cause a panic. I mailed you a clipping from the Austin Post regarding the recent law in Texas."

All these gentlemen had their eyes out for the antitrust law.

"But as you were out of the city I don't know whether you saw it or not. This has had the effect of upsetting our force in Texas. I am not surprised at the uneasiness it has caused with our force. They are like new recruits; they have never known or even suspected that they were in any way connected with the A. T. Company, and when they found where they were at, that caused confusion and alarm, and the Texas law on top of that has almost caused a panic in their ranks, and it is no easy matter to get them straightened out. The little old craft in the past three or four months has had sufficient shocks to shake her from stem to stern. I hope to get her back into smooth sailing, but whether I can or not remains to be seen. I inclose you this letter, because I have always received my instructions from you, and I trust that this will always be the case, and I would thank you to let me know if it is all right."

Of course that is the sort of evidence which speaks more potently, with more truth, and which carries a great deal more weight than all the testimony of witnesses as to what they intended or what they did not intend; that they were growing in a legitimate, orderly way; and that they never had any idea of suppressing competition. These men go on the stand one after the other, and "with ~~devout mien~~ and pious ~~visage they~~ do sugar o'er the devil himself;" so that you would think the last thing that any one of these gentlemen ever entertained in his mind was the idea of excluding a competitor or of acquiring any such predominance in the business as to subject him to the offense of being a monopolist. The true situation is to be gathered only from letters of this kind, found in the files of this company itself, telling these plain, unvarnished tales between men who had to communicate with each other because they were dealing with each other—letters such as this one, from this harassed gentleman, with his force like a swarm of bees about his ears because they were afraid that their factory would be closed up. For the result of all their observation was that when the American Tobacco Company acquired a competitor of the kind they were, the probability was that they were going to be thrown out of employment.

The record is full of these instances. Perhaps in passing I might dwell for just a second upon the matter of the American Cigar Stores Company.

After the American Tobacco Company got control of the United Cigar Stores Company, people began to get an idea that the American Tobacco Company was back of it. It had not been made known. Mr. Estabrook, of Boston, seems to have had some disquiet of mind on the subject; and he wrote to Mr. Hill, the vice president of the American Tobacco Company, to know whether or not the American Company was back of the United Cigar Stores Company. And Mr. Hill ~~Estabrook~~ writes:

"Of course all rumors to the effect that our company is back of the United Cigar Stores Company are entirely without foundation, as we have no financial interest whatever in that company."

At the very time of writing that letter, as Hill well knew, nearly all of the stock of the United Cigar Stores Company was owned by the Blackwell's Durham Company, every share of the capital stock of which was owned by the American Tobacco Company. He tries to explain that by saying that in the first place he was not under any obligation to tell, and in the second place he was not technically telling an untruth, because it was not the American Company, but the Blackwell's Durham Company, that was back of it.

Instances of the methods by which competition was destroyed throughout the country through these secret companies might be multiplied indefinitely if I had time. I only refer to these one or two specific instances for the purpose of challenging and controverting the contention that was put forward by counsel for the Tobacco Company of the sweet, placid, dreamlike growth that they have depicted to this court, free from all idea of any undue or improper conduct. According to them we have here a record barren of any instances of oppression or of fraud; the absence of any witnesses to testify to improper dealings; nothing but the most idyllic condition of business growth.

I say it seems to me that counsel for the Government very wisely refrained (and I can say so, because I had nothing to do with the taking of the testimony and no responsibility for it at the time) from going out into the trial of all those many collateral matters, which might have prolonged this trial indefinitely, and might have resulted in a record like this which is before you in the Standard Oil case, but which the circumstances of that case made it essential to have there. I believe you will find enough in the five volumes of this record to clearly demonstrate to your minds the character of this organization, the methods by which it grew, the way in which it did exercise its powers, and the way in which it might at all times exercise its powers—from which, as I contend, you must infer a growth stamped by all those characteristics which, in every authority with which I am familiar, mark an interference with the free flow of commerce and constitute an attempt at monopolizing.

Mr. Justice LURTON. But, Mr. Attorney General, before you pass away from these instances, let me suggest that the other side has contended very earnestly that the instances you have cited are sporadic; that they are not at all characteristic of the methods by which these organizations have been brought about and their business conducted.

Mr. WICKERSHAM. Of course it is impossible in the time at my disposal to go through the record, but I cite them for the purpose of showing, and I do contend, that they are characteristic of the methods which they resorted to whenever it was necessary to resort to them to attain the end which they had in view; and that the end which they had in view was the end which is obvious—the end which they have reached in every avenue of the trade save one—the acquisition of the entire trade and commerce of the United States in tobacco and its products and the control of all the export trade.

Mr. Justice MCKENNA. You say "the methods they resorted to whenever it was necessary"?

Mr. WICKERSHAM. Yes; whenever it was necessary.

Mr. Justice MCKENNA. That is a qualification. How often did they find it necessary?

Mr. WICKERSHAM. There are a number of instances shown in the record when they seemed to think it was necessary. As an example, there are 20 corporations which they acquired and controlled secretly, which they used for the purpose of acquiring a more complete control over the market—which they used for the purpose of destroying brands, for example. Let me go a step farther——

Mr. Justice LURTON. Have you anywhere set out those secretly controlled corporations? There is no brief anywhere in which you collect those instances of secretly controlled corporations, is there?

Mr. WICKERSHAM. Yes; they are all summarized in the Government's brief. They are enumerated and references given to the record.

The defendants contend that the tobacco business is one of brands, that no competition in brands is of any value, and that the only effect of an effort to introduce a new brand for the purpose of driving out of business an established brand is to increase the demand for the former.

The CHIEF JUSTICE. Mr. Wickersham, if it does not disturb you, I should like to ask you a question that is running in my mind.

Mr. WICKERSHAM. Certainly.

The CHIEF JUSTICE. I wish to put two subjects before you. Do not answer in regard to them now, but in your own order:

You opened your argument by stating that before this first agreement was made these people were engaged in a ruinous competition.

Mr. WICKERSHAM. Yes, sir.

The CHIEF JUSTICE. The effect of this agreement being to stop that ruinous competition. Is it your conception that the statute compels the continuance of a ruinous competition?

That is the first question. Just answer it whenever it is convenient.

Then in another part of your argument you said that the record developed the fact that the tobacco trade is of such a character that a man who goes into one branch of it is obliged to go into all.

Mr. WICKERSHAM. Substantially.

The CHIEF JUSTICE. That being so, at some time in your argument I should like to hear from you as to how far that fact goes to justify the going into all and removes the criticism which might otherwise result from going into all.

Mr. WICKERSHAM. Let me answer your honor's second question right now, because that is a question of fact.

I do not criticize their going into another business. My only criticism is that they are going into that business for the purpose of absorbing it all. My criticism is that they are going into it as a means of gradually getting the control of the whole business, and that the mere fact that when a man deals in one kind of tobacco he insensibly and almost from the necessity of the case gets into some collateral kinds of tobacco business does not justify his going after and attempting to bag the whole. Otherwise, if that is not the case, the fact that a man has started a cigar stand will justify his gradually forming a combination to buy up the whole tobacco business of the United States and exclude everybody else from it.

I say the defendants contend that the business is one of brands and that no competition in brands is of any value. But the evidence absolutely disproves any such claim as that. There are countless instances in the record of a determined, successful effort on the part of the representatives of the different companies in this combination to drive out of business a well-established brand sold by independent dealers. The method pursued was to procure a secret control of a company supposed to be independent. In the case of companies selling with a union label they devised a brand to be made by one of their companies in close imitation of a brand manufactured by an actually independent company which was selling well in that territory, and by the expenditure of large amounts in advertising and selling their product at exceptionally favorable rates they endeavored to run out of the market the independent brand, often succeeding in doing so.

A typical instance of this is afforded by the case of the Nall & Williams Company, a Kentucky corporation, whose stock was acquired by the American Tobacco Company. The concern of H. N. Martin & Company, of Louisville, was a competitor of the American Tobacco Company—an independent company which manufactured

and sold a brand know as Martin's Navy. Representatives of this combination concocted a brand to be sold in competition with it by the Nall & Williams Company, the secretly controlled company, which should be represented to be the work of an independent competitor. The brand was submitted to C. C. Dula, the vice president of the American Tobacco Company, who wrote to the vice president of the Nall & Williams Company on March 11, 1903, a letter which is found on pages 507–508 of volume 2 of the record:

"Samples of Arrow Head referred to in your favor of the 8th instant came to hand this morning. I have examined them very carefully and am much pleased both with the appearance and the chew. The filler and sweet certainly both show up well. It is a tough, pleasant chew, and if the people really want a good piece of anti-trust, union-made tobacco, I certainly think you have it. I think you should direct your efforts particularly in the territories where the Detroit and other Louisville manufacturers have some business. A 3 by 12 five-space piece as good as Arrow Head should knock Martin's Navy in St. Louis into a cocked hat."

It may be said that that is forensic. It may be said that it is sporadic. As a matter of fact, that is a selection of a typical instance of the way in which they went after the independent brands. It shows that the conception of the officers of this company, who were writing letters to the managers of the secretly controlled companies, was very different from the contention of counsel here with respect to the possibility of destroying by competition an existing well-selling brand.

Testimony as to secret efforts is found in Dula's testimony, particularly in the second volume, and among other things there is a letter written by Dula to Middleton, a bogus independent, who was a member of the association of independent dealers. They even had their representatives of these secretly controlled companies serving on the committees of the independent dealers, so that through that tentacle they were enabled to keep in touch with exactly what the independent dealers were doing, and to use that information as it suited them in their business.

Dula, the vice president of the American Tobacco Company, writes to Middleton in July, 1903, as follows:

"As regards profits, while I would like you to show as much as possible, my idea is that you should not make money at the expense of trade, providing, of course, that you are getting this business from certain people."

That is to say, "keep up this destructive competition against our rival just as far as you have to in order to get his business, but don't waste any money beyond that point."

And there is some more of that.

So much for that. It is impossible to go into it at greater length. I think I have cited enough instances to show what I conceive to be the characteristics of the business as conducted whenever it was to their interest to conduct it in that way, and of the power which they had acquired, which was exercised or not at their own discretion, to accomplish their scheme.

Mr. Justice McKenna. Have you cited all the instances?

Mr. Wickersham. I have not attempted to cite all the instances. I have cited a few instances that I found as I ran through the record, which I thought would best illustrate the point I am trying to make.

The evidence is conclusive that by eliminating competition, by means of the combination attacked, the defendants have secured the absolute control of the market in leaf tobacco of the kinds in which they deal.

Judge Noyes, in the court below, says on this point:

"Subject to the economic limit that prices can not be fixed so low as to deprive the grower of inducement to raise future crops, the extent of the defendants' purchase of tobacco leaf necessarily gives them large power to fix the prices to be paid for the types which they require. Prices may be regulated, as the defendants assert, by the law of supply and demand, but the difficulty here is that the demand for many types comes, practically, from only one source. To whom, for example, can the growers of Burley or Virginia sun-cured tobacco sell their crop if they refuse the prices offered by the defendants?

"Similarly, the production by the defendants of by far the greater part of the tobacco used in this country gives the power to control the prices of the manufactured article, subject to the economic limit that if placed too high the consumer will give up the use of tobacco. It is not a question of going to another producer. No other producer could supply the amount required. Where will the users of snuff obtain it if they are unwilling to pay the prices charged by the defendants?"

Mr. Nicoll says that the price paid for the leaf tobacco has not decreased; and he instances that, and stress is laid upon it by Mr. Parker as showing that this combination, although it now has this vast control over the market for leaf tobacco, has not and, perhaps, he argues, can not control its price. Mr. Nicoll contends that these people are between the upper and the nether millstone, and that the prices are controlled by the farmer and the ultimate consumer.

Well, now, let us see. There is a significant table printed as an appendix to the Government's brief (Appendix G) which is taken from the reports of the Department of Agriculture for the year 1908. It shows that the acreage of tobacco production in the United States in the year 1900 was 1,046,427, and that there was a steady diminution of the amount put under cultivation until in the year 1907 (when this testimony was taken) there were only 820,800 acres

under cultivation, and in the year 1908, 875,425. So it is no wonder that there has been no reduction, but on the contrary some increase in the price, because with this constantly increasing use of tobacco and with the constantly increasing demand for the raw material we have an actual reduction in the acreage under cultivation from 1,046,427 to 875,425.

Mr. Justice LURTON. The average price in the fifth column of that table includes every variety, grade, and type of tobacco, does it?

Mr. WICKERSHAM. I suppose it does; yes, it must. That is the average farm price of every grade and kind. Of course, this is a table which has value for certain purposes and none for others. It is valuable in this connection as showing the total amount of acreage under cultivation and the total production in the years 1900–1908. It shows that whereas in the year 1900 there was a total production of 814,345,341 pounds, in the year 1907 there was only 698,126,000, and in the year 1908 only 718,061,380.

Mr. Justice HUGHES. There seems to be a discrepancy, Mr. Attorney General, between Government Exhibit No. 76, in volume 5, and this table, Appendix C in the brief, as to the total production.

Mr. WICKERSHAM. Yes; there is, your honor, and I do not undertake to reconcile them. But it is sufficiently great, I think, to——

Mr. MCREYNOLDS. One is their estimate.

Mr. WICKERSHAM. One is their estimate, the other is an official estimate, taken from the report of the Department of Agriculture.

Mr. Justice HUGHES. There is a difference of one hundred and seventy-odd million.

Mr. MCREYNOLDS. One is the Government's estimate and the other is theirs.

Mr. PARKER. You do not mean it is an estimate offered by the prosecution. One was introduced in evidence and the other was not.

Mr. MCREYNOLDS. One is the estimate of the Bureau of Statistics, and the other is the defendants' estimate.

Mr. Justice LURTON. While you are on that table, let me inquire how you account for the apparent increase in the average price of tobacco?

Mr. WICKERSHAM. How do I account for it? Of course it is not in evidence; but I account for it, as a matter of public history, as being the result of the control of the amount of raw tobacco produced in the South through the operations of the Society of Equity.

Mr. Justice LURTON. The operations of those great societies of planters pooling their tobacco in order to get a better price, which you say are not shown up in the record?

Mr. WICKERSHAM. Yes. In other words, I take it that the natural consequence of a combination of this kind must always be to throw producers into like combinations. Of course it is very hard to get the

farmers into a combination and get them to stick. But, considering the matter from an economic standpoint, what would you do if you were a farmer in a certain region of the country, and if you were confronted with an aggregation of all the buyers, who had you absolutely at their mercy, and could dictate terms to you? It is all very well to say, "You can put your land in cotton." But you can not. You can not always grow cotton on land where tobacco will grow. Besides, the man who all his life has grown tobacco does not know anything about cotton; and it is pretty hard for him to turn around and learn to raise a commodity the production of which requires a special skill.

What is his natural instinct? It is to get his neighbors together at the corner store and talk over the matter, and agree upon some method of protecting themselves. One of the vices—one of the very things which, as I conceive, this law strikes against—is the result to society of great combinations of this kind. It naturally tends to throw the whole economic world into two great organizations. It produces organizations of laborers, organizations of producers, organizations of middle men; and it results in society dealing, not through its ordinarily constituted agencies of government, but through a series of unofficial organizations of people animated by a sense of their own peculiar interest in that particular case.

The CHIEF JUSTICE. But society economically does not deal through the agencies of government. The Government has nothing to do with the dealings of people. That would be paternalism, pure and simple.

Mr. WICKERSHAM. Precisely; but the Government has to come in and protect society, as it has sought to do through the Sherman law. We are now getting off into the domain of political economy; and perhaps we had better stick to law.

The CHIEF JUSTICE. It seems to me that if that explanation is true—that the result of a combination on one side is to produce a combination on the other, which makes the product sell higher than it ever sold before—you are describing a very benign result.

Mr. WICKERSHAM. It is benign to the producer of the raw material. Whether or not it is benign to the ultimate consumer is another matter. He might object. And after all, it is the ultimate consumer who, under those circumstances, gets into a condition where I do not think he regards it as especially benign.

However, it appears from the testimony of Mr. Harris, the chairman of the board of the British-American Company, that the American Tobacco Company buys substantially all the tobacco grown in America for the British-American Tobacco Company. Prior to the agreements of September, 1902, the various British companies purchased leaf tobacco in America, exported it to Great Britain, and

there manufactured it and shipped it to countries other than Great Britain and the United States. The agreements of September, 1907, put all of the business which had theretofore been done by these English companies, buying in competition in the leaf market in this country, into the hands of the British-American Company. The British-American Company put the purchasing in the hands of the American Tobacco Company. So one of the results of this combination has been that all of the leaf tobacco purchased in the American market for export for Great Britain, there to be manufactured and exported to other countries, is purchased by the American Tobacco Company, and the competition in such purchases theretofore existing (existing before these agreements) in the leaf-tobacco market has been eliminated and destroyed.

Mr. Johnson contends (and if I understood Mr. Parker he repeated the contention) that the acquisition of property not charged with a public use can not be a combination in restraint of trade, contrary to the Sherman Act.

Here, as throughout his argument, he confuses the acquisition of the stock of one corporation by another with the ordinary case of the purchase of property. He seeks to confine the controversy to a consideration of the purchase of the property of one manufacturing company by another and the technical merger or consolidation of two or more corporations under the laws of the States of their creation. We do not for a moment dispute the fact that under the laws of the different States referred to power is given for the formation of corporations for the purpose of manufacture, to acquire property, and to consolidate and merge corporations, any more than it was contended in the Northern Securities case that power was not given to the Northern Securities Company by the laws of New Jersey to acquire and own capital stock in other corporations organized under the laws of other States. What the Government attacks, and what the court below decreed to be illegal in the case at bar, is a combination composed of sixty-odd separate corporate entities and a great number of individuals spreading its branches to remote parts of the United States and its possessions and into foreign countries, purchasing raw material in many States and shipping that material into other States, where it is made up into commercial products, which are then sent for distribution by different distributing agents in many States, pursuant to orders obtained by its many agents in various States and Territories of the Union, as well as to foreign countries. It is the control of *this* business, the domination of trade and commerce in the products of tobacco, amounting to millions of dollars in value and an enormous proportion of the entire commerce of the country in such articles, that gives to this combination the absolute control of the business—a power which may be exercised or not at

the will of the few men in control of the combination which constitutes a restraint of trade and commerce in tobacco and its products among the several States and with foreign countries, and demonstrates that the defendants are monopolizing or attempting to monopolize the entire trade and commerce in such commodities among the States and with foreign countries..

As illustrative of that thought, in the contracts made in England the parties themselves have given a construction to the business that they are doing, by defining in Exhibit 2 what they mean when they sell and transfer by these agreements the export business. When the American Tobacco Company and the Imperial Company sell and transfer their export business to the British-American Company under these agreements, they define "export business." And what do they define it to be?

They say, on page 125 of volume 1:

"The words 'export business' mean the manufacture of and dealing in tobacco and its products in any country or place outside the United Kingdom and the United States and the manufacture of and dealing in tobacco and its products within the United Kingdom for export to any other country except the United States, and the manufacture of and dealing in tobacco and its products in the United States (except in Cuba, Porto Rico, the Hawaiian Islands, and the Philippine Islands) for the purpose of export to any other country except the United Kingdom, and the manufacture and selling in the United Kingdom and the United States, respectively, of tobacco to be supplied to ships in port for the purposes of ships' stores."

That was their export business. They are dealing throughout with the control of a *business*, in which all of these were various factors. They bought the raw material; they transported it to the place where it was manufactured into a finished product; orders were taken from various parts of the country and transmitted to headquarters; orders were given from headquarters to ship it from convenient places of storage to the ultimate purchaser; and it was the control of that business which was the subject of this combination.

The Government does not challenge the power of the defendants to incorporate or to consolidate or to merge corporations under State laws. But it does contend that such powers can not be used for the purpose of maintaining or creating a restraint of trade or commerce, or accomplishing a monopoly, in violation of the act of Congress.

Mr. Justice HOLMES. Mr. Attorney General, if I may interrupt you for a moment: It seems to me that you speak of actual interference, or the actual intent to interfere, and the mere power, as if they were identical things. I must say that I have been rather troubled (and I was during the former argument) in listening to Mr. McReynolds and in then listening to you, in making up my mind

as to what is the precise criterion that you adopt. I have looked at your brief and I see that you say:

"Trade and commerce * * * are monopolized whenever as the result of the concentration of competing businesses," with an exception, "one or a few corporations * * * practically acquire power to control prices."

Do I understand that your argument means to adopt the proposition that the simple possession of the power—in other words, simple size—may constitute monopoly?

Mr. WICKERSHAM. No; I do not maintain that. I think on the former argument, if I recollect correctly, I was asked that question, and made substantially the same answer.

Mr. Justice HOLMES. I wanted to be sure that it was not an oversight. I asked you the same question on the former argument; and I thought that was not your position.

Mr. WICKERSHAM. That is not, and never has been, my position. And perhaps I should turn to the question of monopoly at this stage.

Our contention has been that this combination of all these corporations in its operation has constituted, within the meaning of the decisions of this court, a restraint of trade; that the various agreements and combinations have constituted combinations and contracts in restraint of trade within the meaning of the first section; and the court below so held, with the exception of the English contracts and in their operation on the British-American and the Imperial companies. I never have been able—because the court did not go into any extensive reasoning on that point—to comprehend on what theory (assuming that the court was correct in its principal finding) it could have let out the British-American and the Imperial companies. But that is neither here nor there for the moment.

What the court below did not find, but what the Government has contended here and does contend here, is that the defendants are shown by the evidence in this case to be monopolizing or attempting to monopolize interstate and foreign trade and commerce, contrary to the provisions of section 2 of the Sherman Act.

Mr. Justice LURTON. You do not put the Government's case on that section alone?

Mr. WICKERSHAM. No; I do not put in on that section alone. I say that I think the evidence here discloses both the combinations which have been found by the court below, and the fact (which they refrained from finding) that they have been and are engaged in monopolizing or attempting to monopolize the trade and commerce of the United States, interstate and foreign, in tobacco and tobacco products. I think it is proper to answer here the question which Mr. Justice Day put yesterday, when he said that by this time the Govern-

ment should have some consistent theory about the question of monopolization. Therefore, speaking for myself, my own theory is this—and I should like to work it out as I have done for the purpose of illustrating the conclusion to which I have come:

In the debates on the passage of this bill Senator Hoar said that it was agreed in the committee which framed the bill in the form in which it was finally passed that—

"Monopoly" is a technical term known to the common law, and that it signifies—I do not mean to say that they stated what the signification was, but I became satisfied that they were right, and that the word "monopoly" is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him. (Bills and Debates in Congress Relating to Trusts, p. 323.)

Now, turning to the English reports for a modification or contradiction of Senator Hoar's definition of a monopoly in the view of the common law: The great fund of learning on the subject is, of course, the great Case of The Monopolies (*The East India Company* v. *Sandys*, 10 Howell's State Trials). In that case Mr. Holt, afterwards lord chief justice, said:

A monopoly is an institution or allowance of the king, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything; whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade * * * (p. 379).

"The nature of a monopoly," said Sir George Treby, "consists in restraining a common right; it appropriates to one, or a few, what others had the lawful use of before." (p. 386).

Mr. Pollexfen elaborated the thought a little more specifically. After reviewing the earlier decisions on the subject of monopoly he said:

"These, my lord, are the books; and thus they speak generally at the common law; and I offer it to your lordship as a further reason, that the common law is such, notwithstanding all their arguments, in regard that the common law, as far as it is against engrossing, is also against all sole trade. For, my lord, all sole trade is engrossing, as I take it, with submission; appropriating trade and merchandise to a particular person or persons or body politic, excluding others, is engrossing such trade. Now that engrossing is against the common law, and against the very fundamentals and principles of the common law; that, I think, I need not labor much to prove, nor shall I go about to cite many books to prove that. (Page 421.)

"But, then, my lord, to prove that sole trade is engrossing, that the nature of the thing must speak: For whosoever has the sole trade of buying and selling of such a sort of commodity, or whosoever has the sole trade to any particular country or place, has thereby the sole

engrossing and sole having of all the commodities of that place; so likewise has he the sole buying, and all the people that have to deal about the commodities that are to be vended and vented in that country or place are at his will and pleasure; and thereby he makes all those his own, and he makes what price he pleases and orders and disposes of them, both as to value and everything else, as his own. And thereby, my lord, I take, it must be engrossing; and every monopolizing of buying and selling, or of trade, is engrossing. But that only engrossing is by particular agreement and contracts between particular men, among one another, without the king's authority or help of his letters patent, but monopolizing is engrossing under color of authority, by help of those letters patent that create them, for the consequence of it must be that they would sell at their own prices and thereby exact upon the king's subjects, and their patent for the sole trade to the East Indies invests them in all the merchandises of these countries and engrosseth all in their hands. Then if engrossing by the common law be forbidden and it is unlawful to do it, all letters patent to authorize and help men to engross must needs be as void as that, which is the end of engrossing; and that is monopolizing." (Page 422.)

In other words, in the reign of James I, monopolizing was engrossing with the added protection of a royal patent. To-day monopolizing is engrossing with the added protection of a State charter, such as that granted to the American Tobacco Company by the State of New Jersey, by means of which the stocks of naturally competing corporations are held by another and competition prevented.

Engrossing is to-day, as in the seventeenth century, "appropriating trade and merchandise to a particular person or persons, or body politic, excluding others."

"The sole trade of any mechanical artifice," said Lord Coke in the case of The Monopolies (2 Coke's Reports 84b) "or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; for the end of all these monopolies is for the private gain of the patentees."

In the old case in Pickering of *Alger* v. *Thacher*, a bond conditioned that the obligor should not carry on the business of founding iron was held void as tending to a monopoly.

In *People* v. *Chicago Gas* (130th Illinois), the purchase of the stock of one gas company by another was held void as tending to establish a monopoly.

In *Salt Company* v. *Guthrie* (35 Ohio State Reports), an agreement among a number of salt manufacturers to regulate the price of salt was held void as tending to establish a monopoly.

In *Chapin* v. *Brown* (83d Iowa), where all the grocerymen in a town, in order to avoid a trade in butter which was burdensome, agreed not to buy except for use in their own families, so as to throw the trade to one person, it was held that the agreement was void as tending to create a monopoly.

In *Craft* v. *McConoughy* (79th Illinois), articles of agreement between four grain dealers in a town under which, while apparently carrying on their own separate businesses, they were really to pool their earnings and their expenses in agreed proportions, was held void as an attempt to monopolize the entire grain trade of the town and the surrounding country.

Through these things runs the principle explained by Pollexfen in the case of The Monopolies. The agreement or combination was void because it was an effort on the part of those concerned in it to engross and absorb to themselves all the trade of a given region, in a particular commodity, to the exclusion of others.

In the Addyston Pipe case, Judge Taft, in the circuit court, said:

"But in recent years even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose."

Mr. Justice LAMAR. What would you say as to a combination of all these independent companies to meet the situation? Would that be a monopolization of trade as denounced by the second section?

Mr. WICKERSHAM. I think so. I think the mere form in which it is carried out is immaterial, if it is done with the intent of producing the forbidden result.

Mr. Justice HUGHES. Do you consider the intent or the effect as the criterion?

Mr. WICKERSHAM. There, if your honor please, you are anticipating what I am coming to, if you will pardon me.

Mr. Justice HUGHES. Certainly.

Mr. WICKERSHAM. In the Pearsall case, the State legislation which prevented the Great Northern Railway Company from acquiring a control of the capital stock of the Northern Pacific Railroad was sustained as a proper exercise of the police power to prevent the monopolization of the transcontinental traffic north of the Union Pacific Railroad, the court considering that the proposed acquisition would put it within the power of the consolidated corporation to increase rates, and, in short, would put the public at the mercy of the corporation.

So, as your honor the Chief Justice pointed out, in the Chesapeake & Ohio case, the power of the Chesapeake & Ohio Rail-

road or of any other railroad to carry commodities which it produced at a rate which (attributing the published tariff to the transaction) would leave as the cost of the commodity less than the cost of production, put in its hands a power which would tend, if unchecked, to enable it to monopolize all the traffic on its own line.

The CHIEF JUSTICE. But that was a case where they actually did it.

Mr. WICKERSHAM. True; but you pointed out the power that they would have to do it in other cases as tending to a monopoly.

In the Swift case Mr. Justice Holmes said, as to intent (and it is about as accurate a statement as I know of in the books on this subject)—

"Intent is almost essential to such a combination, and is essential to such an attempt" (to monopolize). "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen." (196 U. S., 375–396.)

Perhaps the confusion of ideas on the subject arises more largely from the application of this rule than from any real difficulty in the principle. Intent is a question of fact, to be ascertained like other questions of fact. It is a deduction which must be made from the evidence by the court, or by the jury in a common-law case. Proof may be made of intention by direct evidence, or by the application of the rules of presumption to conceded or demonstrated facts. Thus, necessary consequences are presumed to be intended, and the direct, immediate, and necessary effect of acts can not be overcome by declarations of contrary intention.

There is a presumption that people intend to act in accordance with the ordinary rules which experience has shown control the action of men in given conditions. So, in the Northern Securities case, Justice Harlan, in his opinion, said:

"That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce * * *. It need not be shown that the combination * * * results * * * in a total suppression * * * or * * * monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition." (193 U. S., 331–332.)

In the National Cotton Oil case, in discussing whether the anti-trust laws of Texas (which were sought to be enforced against the plaintiffs in that case) were repugnant to the fourteenth amendment of the Constitution, the court upheld the statute as a valid exercise of the police power of the State, upon the ground that "it is cer-

tainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil."

Mr. Justice McKenna, in writing the opinion of the court, said that the court was not called upon to discuss the foundations of the belief, nor was it required to distinguish between the kinds of combinations or the degrees of monopoly. He said:

"It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include 'a condition produced by the acts of mere individuals.' Its dominant thought now is, to quote another, 'the notion of exclusiveness or unity;' in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them." (197 U. S., 129.)

Mr. Justice LURTON. What case are you reading that from?

Mr. WICKERSHAM. I am reading from the case of *National Cotton Oil Company* v. *Texas* (197th U. S.). In that opinion he says—and what he says there is just as applicable to the case at bar as it was to the facts there—

"The argument, which is directed against the validity of the statutes, is drawn from extremes. It is difficult to present its elements in a concise way. Its ultimate foundation is the right of individuals and corporations as well, under the Constitution of the United States, to make contracts and combine in business enterprises; and, it is argued, to prohibit them from so doing 'in the ordinary way through the making of purchases and sales and the fixing of prices, is clearly to work a deprivation of property without due process of law and to impair the well-recognized liberty of contract, involved in the acquiring, using, and dealing with property,' assured by the Federal Constitution.

"To support the argument the usages and necessity of business are adduced, and partnerships and their effect are brought forward as illustrations. There are some things which counsel easily demonstrate."

Mr. Justice DAY. Does the Judge say where that expression, "unified tactics," comes in?

Mr. WICKERSHAM. He neglected to give the authority for that; but he attributed it to another.

Mr. Justice MCKENNA. He at least tried to give it the sanction of law.

Mr. WICKERSHAM. I think your honor *has* given it the sanction of law.

Mr. Justice HOLMES. Is it not Mr. Ely's expression in his book on "Trusts?"

Mr. WICKERSHAM. Yes, sir; I think it was Mr. Ely who said that. [Continuing to read from Mr. Justice McKenna's opinion]:

"They easily demonstrate that some combination of 'capital, skill, or acts' is necessary to any business development, and that the result must inevitably be a cessation of competition. But this does not prove that all combinations are inviolable or that no restriction upon competition can be forbidden. To contend for these extremes is to overlook the difference in the effect of actions and to limit too much the function and power of government. By arguing from extremes almost every exercise of government can be shown to be a deprivation of individual liberty."

So it would appear to me that the views of this court as recently expressed, as in this case and in other cases cited, demonstrate that the old common-law notion of monopoly still obtains, except that to-day it is brought about as engrossing was of old—by the acts of individuals in endeavoring to engross to themselves all of the trade in a given commodity—and that that was what was struck at in the Sherman Act; that it becomes in any given case a question of intent, which must be inferred either from the direct evidence or by that presumption which is applied by the court to the proven facts; that it is no more uncertain than fraud is, which is an inference from the facts, and must be established either by direct evidence or by proof of such facts that the intent is necessarily implied by the court or by the jury from the evidence submitted.

Just as at common law the attempted grant of monopolies by the sovereign fell before the power of Parliament, so the attempted grant of power by a State legislature, or the attempted exercise of power under color of authority from a State legislature, falls before the paramount law of the United States, if under the exercise of that power there be accomplished restraint of interstate trade, or monopoly. And in determining whether or not the defendants are engaged in monopolizing or attempting to monopolize, while size is an undoubted element, it is not a conclusive one. This court has said again and again that it was entirely immaterial whether or not the effort to secure a desired control has been completely successful. In determining whether or not an acquisition of stock in one corporation by a competitor corporation is a restraint of trade or tends to a monopoly, this court has held that even the control of a majority of the stock of a corporation is not essential to the control of the corporation. In the Pearsall case the control which fell under the ban of the court was of exactly one-half of the capital stock. The court said that the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific road would be assured.

Nor is it necessary that the methods adopted to acquire that control which would give monopoly should in themselves be illegal. In *Swift* v. *The United States* (196 U. S., 396) Mr. Justice Holmes pointed that out. He said there:

"It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

So here, while no doubt singly most of these transactions (which were sales and purchases of factories or of property, buttressed by protecting covenants) might in themselves, standing alone, be a perfectly legitimate restraint within the well-settled rules as to covenants to protect the vendee in the possession of what he has purchased, yet, taken together as a part of a system showing an intent to exclude from competition in the business those who entered into the covenants, a very different aspect appears, and they then fall within the rule which your honors laid down in the case of *Grenada Lumber Company* v. *Mississippi*. (217 U. S.)

The CHIEF JUSTICE. You may suspend here.

(The court thereupon adjourned until to-morrow, Thursday, January 12, 1911, at 12 o'clock m.)

Mr. WICKERSHAM. If the court please, reverting for a moment to the description of the essence of monopoly in the *National Cotton Oil Case* (197 U. S.), namely, the power to control prices, this court observed in the case of Pearsall that—

"Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect—in short, puts the public at the mercy of the corporation." (161 U. S., 676.)

And in *Harriman* v. *Northern Securities Company* (197 U. S.), the Chief Justice, expressing the unanimous opinion of the court, referred to the decision in 193 U. S., in this language:

"For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or trustee, would tend to prevent competition and thus to restrain commerce.

"Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power which if exercised would prevent competition brought the case within the statute, no matter what the tenure of title was." (P. 291.)

But in the case at bar we need not rest merely on proof of the possession of power to control prices and exclude competition, for the

record, in our opinion, amply demonstrates the actual exercise of such power.

Assuming that proof that defendants are monopolizing, or attempting to monopolize, etc., is to be sought in the evidence that they have by means of this combination endeavored to engross and absorb to themselves the interstate and foreign trade and commerce of the United States in the products of tobacco, the Government maintains that the record not only demonstrates that the defendants have combined to control this commerce with the intention of monopolizing it, but that it is clear that they have actually, in large measure, accomplished that object; that they have suppressed competition by unification of interests and management, and that, through agreements and concert of action, they have not only acquired the power to control prices, but they have exercised and are now exercising that power.

Leaf tobacco is, of course, the foundation of the entire tobacco trade, and the control of the price of the leaf means the control of the price of the finished product. So long as the American Tobacco Company can control the price of leaf tobacco, it need fear no serious competition in marketing its manufactured product.

Mr. Yuille, one of the managers of the leaf department of the American Tobacco Company, testified to the arrangements by which the American Tobacco Company controls the market. That is to be found on pages 101 to 106, of the second volume of the record. He testified that the American Company had a representative purchasing tobacco in substantially every market in the United States. I mean every market of the kind of tobacco that they dealt in.

The method in which the orders are placed and the way in which the tobacco is dealt in, are described by Mr. Yuille in his direct examination at pages 107 and 119.

Mr. Carlton, who bought leaf tobacco for the Imperial Tobacco Company at prices fixed by a committee in England, as shown in the fourth volume of the record at page 297, testified that since 1903 the bright tobacco crop has gradually decreased until the current year. In 1908, when he testified, he said he thought there would be an increase, and that the demand for tobacco had gradually increased; that to some extent there had been an effort among the farmers by cooperation to advance the price of their tobacco, and the prices of western tobaccos had advanced.

Your honors will find that testimony at page 300 of the fourth volume of the record; and I refer to it here in order to answer a question which his honor, Mr. Justice Lurton, put on the argument yesterday with respect to evidence concerning cooperation among the producers.

Mr. Hill produced a letter addressed to him by Mr. Strotz, one of the directors of the American Tobacco Company, under date of

April 26, 1904, reading as follows (page 285 of the second volume of the record):

"I hand you herewith a newspaper clipping which will give you a general idea of the Burley situation. I do not think it well to put in a letter just how this situation was brought about. Its condition now is that we have requirements for all of our companies at an advance of about 2½ cents per pound over normal cost. Outside manufacturers have been caught very short, and as all old tobaccos and the new crop has been practically cleaned up, they are bidding against each other on what little there is left and paying fancy prices for what is still unsold, and the indications are that if they do get their requirements it will be at such a cost that they will be utterly unable to make any money for a year to come. Our own additional cost of leaf, we think, we can get out of the selling price of our goods."

Mr. Carlton, who has been in charge of the leaf-buying interest of the Imperial Tobacco Company in America since July 1, 1902, testified in the fourth volume of the record, at page 229, as to how completely the leaf market was under the control of the combination. In his letter to the secretary of his company, dated January 27, 1903, he says:

"The A. T. Co. are now contracting at 27½ cents for all their 1903 and 1904 requirements, and the arrangement with them is that they will put us exactly on the same terms as they themselves buy it. In the absence of definite information regarding quantities, it is unsatisfactory for us to fix quantities now, but from the nature of the A. T. Co.'s letter you will see that it is necessary to do so." (p. 246.)

On August 14, 1903, he wrote to the secretary of his company (to be found in the fourth volume of the record, at pages 250–251)——

Mr. HORNBLOWER. Do you say that is Mr. Carlton?

Mr. WICKERSHAM. Mr. Carlton, yes. On August 14, 1903, he wrote to the secretary of his company:

"The markets in South Carolina and eastern North Carolina have been opened, and the primings"——

Mr. HORNBLOWER. You are wrong about that.

Mr. WICKERSHAM. That is at pages 250 and 251. Mr. Hornblower thinks that I am mistaken in the name of the writer.

Mr. HORNBLOWER. That was before Mr. Carlton's day.

Mr. WICKERSHAM (after examining record). It was James Macdonald; but it does not make any difference whether it was Mr. Carlton or any other person. It was the representative of the Imperial Company; and this is what he wrote, on August 14, 1903:

"Dear Sir: * * * The markets in South Carolina"——

It was James Macdonald; not Carlton——

"The markets in South Carolina and eastern North Carolina have been opened, and the primings, which are mean and sandy, have sold at exceedingly low prices. Our buyers have not touched them, and the feeling amongst farmers against the A. T. Co. is most bitter. We

are just beginning to buy a few of our grades, and indications are that prices will be low and quality fairly good. The color seems to be better than was anticipated. At our present limits C. D. should be put down in England at 6¾ to 7d. per pound, and C. F. at 5¾ to 6d."

Now, skipping a sentence:

"It is impossible to say whether present prices will continue during the season, but as speculators generally seem to be afraid to operate it looks as if prices will be determined practically by A. T. Co. and ourselves. So far A. T. Co. are acting most conservatively."

Later in the year he wrote to the secretary, and the letter appears on page 251 of the same volume. This is from Mr. Macdonald, again, to the secretary of the Imperial Company. He writes as follows:

"DEAR SIR: It seems that a few markets, particularly in South Carolina, some speculators have been buying some cheap low-grade semis, at very low prices, of primings. When sampled these may look, owing to the colory nature of the crop, very attractive and the faults may not be so evident until the bulk is examined. It is a grade of tobacco which we thought better to leave alone, and, with the exception of the speculators referred to, it has been bought practically by the A. T. Co. It occurs to us that some of our branches, not knowing what we are going to send forward, might, in the event of being shown these tobaccos, be tempted to buy them. It is clearly against the interest of our company that anything of this kind be done, as it would only encourage the speculators to continue shipping and so raise an opposition to ourselves on the market. We understand it is distinctly arranged that no branch has power to purchase any tobacco without the consent of the executive committee. If this is so there is no need to trouble further in the matter, but we think it right to call the committee's attention to the present circumstances."

On September 7, 1903, he wrote, reporting a conversation between Mr. Reed, of the Imperial, and Mr. Glenn, head buyer of the American Cigar Company (which letter is to be found on page 252 of the record), saying:

"Mr. Glenn expressed a strong desire that any of our branches requiring Wisconsin, York State, Connecticut, or any other States cigar seed leaf, would place their orders with the American Cigar Company, giving full particulars and samples. He promised to supply them on same terms as their own branches. They practically already control the trade, and expect our branches will not support any independent shippers to their disadvantage."

The letter of James Macdonald, again the same writer, to the secretary of the Imperial Tobacco Company, dated January 26, 1903, which is found at pages 243 to 246 of the record, volume 4, shows clearly the close arrangements between the American and the Imperial companies for the control of the market in leaf tobacco.

Reed's letter to Yuille, found on page 256 of the same volume, shows a distinct agreement with respect to purchases. Evidently Yuille had complained that the Imperial was exceeding its proportion

of the leaf which it was to buy, and Reed had looked the matter up and was writing to Yuille explaining that:

"As a matter of fact the purchase of this mark at Wilson last week were only 2,000 pounds, and total purchases of all our strip grades only 122,000 pounds. This, as you will see, is considerably below 40 per cent of the total sales, which is what we regard as our share of Wilson tobacco. I think, had you been in Wilson yourself, you would have taken a different view of the state of affairs there, but we are anxious to avoid any possible friction and are quite willing to meet your views in this direction as nearly as we can."

Macdonald's letter, again, to the secretary, dated September 10, 1903, and found at pages 253–254 of the same volume, clearly indicates a complete understanding between the two companies with respect to the entire market:

"Both the A. T. Co. and ourselves, we think," said Macdonald, "ought to act for the present very conservatively so as to insure our being able to remain on the markets until the end of the season, because if one or the other were to get their requirements filled up before the end of the season the result on the market would be disastrous. Our hope is that both of us will be able to remain steadily on the market and if it is thought, toward the end of the season, advisable to raise limits so as to encourage farmers for the ensuing season, this could be done. If, on the other hand, by any chance prices toward the end of the season were lowered, the effect on farmers would be distinctly prejudicial to next year's growing."

In other words, the limit on the power of the monopoly was the amount of discouragement of the farmers against raising a sufficient crop to meet their needs. As Judge Noyes aptly put it in his opinion:

"Subject to the economic limit that prices can not be fixed so low as to deprive the grower of inducement to raise future crops, the extent of the defendants' purchase of tobacco leaf necessarily gives them large power to fix the prices to be paid for the types which they require. Prices may be regulated, as the defendants assert, by the law of supply and demand, but the difficulty here is that the demand for many types comes, practically, from only one source." (Rec. 1, 317.)

The general volume of evidence as to what was done speaks with a far more convincing voice than the protests of the officers of the defendant companies. No express agreement or explicit orders were required to regulate the action of men who were agents of companies in such complete combination with each other as the defendant corporations here. As Yuille testified, referring to the committee of the board of directors of the American Tobacco Company upon the purchase of leaf tobacco:

"I can't say that the committee ever gave me any orders. We all understand each other." (Rec. 2, 102.)

This was the committee which Yuille testified had charge of the entire operating end of the business, and which he said:

"gets together determining its needs, having statistics from all over the country, and then it decides what it is going to pay on an average for each grade and then instructs its buyers to go in the field and get it." (P. 104.)

Now, a word as to the control of the manufactured product. C. C. Dula testified that the company sold its products in all the States of the Union; that it had a corps of retail salesmen traveling through the different States soliciting orders from the jobbing trade, the policy being to do business through jobbers. The salesmen report directly to the headquarters of the company in New York. They report, among other things, the brands that they find selling in the territory in which they are working. The sale of brands of the defendant companies is stimulated by allowing special cash discounts, and also by what is called gratis tobacco—that is, by adding 1 pound gratis with each 20 or 25 pounds sold—a good many million pounds being distributed gratis in this way. Just consider what chance any independent whom this combination desired to crush would have against such methods pursued by a corporation with $400,000,000 of capital.

Now, with respect to the purchase of supplies, one word in passing. The Amsterdam Supply Company is one of the organizations through which the combination eliminates the competition in buying supplies for the various corporations in the combination which had theretofore existed. The defendants contend that the primary purpose of the Supply Company is not to effect a withdrawal of competition, and they refer in their brief to certain testimony given by Mr. Reed, the president of the Supply Company, to that effect; but the stock of the Supply Company is owned by the American Tobacco Company and 17 others of the defendant corporations in that combination; and each of these stockholders is in agreement with the Supply Company to buy either directly through it, or, if they buy otherwise than through it, to pay a commission on the purchase to the Supply Company.

The annual purchases of the Supply Company for its various customers amount to about $24,000,000 per annum, of which only about $150,000 to $200,000 is for customers other than those connected with the American Tobacco Company.

Mr. Justice LURTON. What is the character of the supplies bought?

Mr. WICKERSHAM. Everything, I think, that they use, except such things as licorice and boxes and bags and containers. It is the general supplies—stationery, I understand, and paper, and sugar—everything that they use, that they would not get through some one of

the companies in the combination, like the Licorice Company and the Box Company.

Mr. NICOLL. Not leaf tobacco.

Mr. WICKERSHAM. No; not leaf tobacco, of course; but everything else that they use is purchased through this Supply Company, and their agreement is that every one of these 18 principal corporations—stockholders in the Supply Company—must purchase through the Supply Company, or else pay to the Supply Company a commission upon every purchase it makes outside of the Supply Company on all articles dealt in by the Supply Company; and the point is that instead of having 18 competitors in the market for those supplies, there is but one purchaser.

The defendants say, however, that the only power of monopolizing that they have is the power which is inherent in wealth, whether that wealth be held by an individual or by a corporation; but the power possessed by these defendants could only have been acquired by the use of the various corporate organizations under the laws of the various States. But for the exercise of that power, under which one corporation acquires and holds stock in many other corporations, it would have been impossible for this combination to have ever come within a million miles of the control which they now have and exercise over the trade and commerce in which they participate.

Mr. Cochran, in the very able and interesting brief that he has filed here, contends that an industrial corporation can not at the same time expand trade and restrain it; and he argues, as my learned friends have argued, that inasmuch as the great volume of business in tobacco products has grown, it is impossible that any of these agreements with this combination should have restrained the trade; but it is clear that the concentration of this vast volume of trade into a few hands tends to discourage production and to embarrass exchange, and that it is not an answer to the charge of restraining trade to say that these defendants have not restrained the total volume of the trade—that they have only absorbed it into their own hands.

In the Northern Securities case——

Mr. Justice MCKENNA. Is it your contention that no matter how much the volume of business has increased and no matter how much the production has increased, the number of competitors and traders has decreased?

Mr. WICKERSHAM. Certainly. The answer does not meet the case when it is said: "Well, we have not restrained trade, because we have it all, and there is no less than there was when we began. On the contrary, we have more than we had." Your honors have answered that in the Northern Securities case, where Mr. Justice Harlan said:

"The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But

the interests of private persons and corporations can not be made paramount to the interests of the general public." (193 U. S., 352.)

Now, coming to the question of the action of the court below in dismissing the bill against the British-American Tobacco Company (Limited) and the Imperial Tobacco Company: These companies were clearly shown to be parties to the unlawful combination, and, although they came into it through contracts made and executed in England, yet it was also shown that they were carrying out those contracts within the dominion of the United States. The evidence shows that prior to September, 1902, the various English companies which afterwards combined into the Imperial Tobacco Company (Limited) bought about 6,000,000 pounds of American leaf tobacco annually in the United States, imported it into Great Britain, where it was manufactured into finished products without the payment of duty and then exported and sold it in the markets of the world in competition with the American Tobacco Company; that the American Tobacco Company bought Ogden's (Limited) in England and embarked on an effort to capture the English business. This led, first, to the combination of the English companies in one large corporation known as the Imperial Tobacco Company (Limited), and, after spending much money and engaging in the most active competition, the concurrence of all parties in the making of the agreements annexed to the petition, whereby all of the business of Great Britain and Ireland was turned over to the Imperial Company, in which the American Tobacco Company was to have a large amount of stock and three directors on the board; all of the American business, including that of the United States, Cuba, Porto Rico, and the Philippine Islands, was turned over to the American Tobacco Company; and all of the export business of the world outside of the United States and its dependencies, including Cuba and Great Britain and Ireland, was turned over to the British-American Company, a corporation organized for the purpose, two-thirds of whose stock was to be held by the American Tobacco Company and one-third by the Imperial Tobacco Company.

Since the execution of those agreements all of the leaf tobacco which is used in the export business, including that which was formerly purchased for that purpose by the Imperial Tobacco Company and the various companies which were consolidated into it, has been bought by the American Tobacco Company, and all competition in such purchases has been thereby eliminated.

One of the effects of this agreement not to compete embodied in these contracts, is shown in the case of the Kentucky Tobacco Product Company. It appears that in 1901 or 1902 the American Tobacco Company entered into a contract with the Kentucky Tobacco Product Company, whereby the former agreed to furnish the latter with

stems and dust produced at Durham, N. C., for a period of ten years at certain prices.

Mr. Justice HOLMES. Who was that contract between?

Mr. WICKERSHAM. Between the American Tobacco Company and the Kentucky Tobacco Product Company. After the English contracts were made in the fall of 1902, that contract was taken over by the British-American Company—since when the latter company sells all its stems to the Kentucky Company.

Mr. Justice HOLMES. The British-American Company is the one in which the American Tobacco Company owns two-thirds and the English company owns one-third?

Mr. WICKERSHAM. Yes; that is the British-American Company. The American Tobacco Company, which is the principal stockholder in the Kentucky Tobacco Product Company, is also under contract to sell all burley stems to the Kentucky Tobacco Product Company. On August 8, 1904, Mr. Harris wrote to the Imperial Company, acknowledging receipt of a previous letter addressed to Mr. Duke, in which the Imperial Company evidently complained of shipments being made in violation of this contract. The letter shows that a concern in New York, in which the American Tobacco Company was interested, undertook to ship some stems or offal out of the country, but the shipments were stopped, "notwithstanding some protests from the minority holders," said Mr. Harris. This, said Mr. Harris, caused the people in the American Company to realize that from time to time any one of the many subsidiary companies in which the American or the Continental was interested might make shipments without the parent company being cognizant of it. To preclude the possibility of any such action in the future, Mr. Harris requested counsel to prepare something in the shape of a letter or clause to cover the point, giving the British-American Company the benefit of an accounting from the American company every half year of whatever proportion it was entitled to of the net profits arising out of exportations into its territory. He suggested that the British-American Company should send such a letter to all parties in the agreement of September 27, 1902, for their acceptance.

"To revert to the matter of offal proper," he added, "I would state that the situation at this end is in good shape, for we can either adopt the plan suggested by you, that is, of allowing the Kentucky Tobacco Product Company to continue its business as at present, and an accounting made to the British-American of the amount accruing to it from the export field, or subdivide the present Kentucky Tobacco Products Company into two, namely, a domestic concern, and an export concern—the B. A. T. Co. being interested only in the export company, of course. * * *

"The question of the disposition of the offal product from the Imperial Company," he adds, "will be an important matter for the B. A. T. Company, since so much more stems will find their way into England than heretofore." (Rec. 3, p. 438–439.)

In other words, these corporations were mere pawns, moved about the board. As suggested, if they wanted to divide one of them into two, they split it in half, and set it on its way.

He advised that some such scheme as Mr. Ogden had suggested should be gotten up, and suggested that it would be wise for the president of the Kentucky Company to visit England and consider that matter with the Imperial Company, adding:

"It certainly is to the interest of all concerned to see that no competition is allowed to exist in the marketing of the finished product in the various countries abroad between the product of the English factories and those of the Kentucky Tobacco Product Company and this is easily accomplished by concentrating the stems into one channel." (Rec. 3, p. 439.)

The same ease of accomplishment with which they had stifled all competition between all other companies could, of course, in like manner, be easily accomplished by concentrating this comparatively minor part of the business into one channel.

Further letters on the subject appear on the following pages of the record (volume 3, pages 438, 439). It is perfectly obvious from this correspondence that some of the provisions of the agreements made in England were being carried out in the United States; that all competition between any of the companies controlled by the combination with respect to the purchase in and export from the United States of leaf tobacco, including stems and offal, had been eliminated, and the entire business turned over to the British-American Company.

Now, on page 441 of third volume of the record there is a letter stating the terms under which the American Company assents to the British-American Company soliciting orders in the Philippine Islands for consumption in those islands of all the brands of cigarettes and tobacco marketed by the British-American Company in export territory by whomsoever manufactured.

Out of their grace and favor they permitted the British-American Company, in which they owned two-thirds of the stock, to go into the Philippine Islands and sell there certain of the goods they dealt in, and which under these exclusive contracts nobody else but the American Company had a right to deal in.

The export business of the five original concerns merged into the original American Tobacco Company in 1890 amounted to about 1,000,000 pounds of tobacco. Practically no one outside of those five companies exported tobacco. Prior to September, 1902, the English companies were in competition with the American Tobacco Company in the purchase of leaf tobacco in the United States and in its exportation into England and in the sale of the manufactured products throughout the world. Since the agreements, Mr. Harris testified, the American Company has not been selling in England except through the Imperial, nor the Imperial in the United States except

through the American, and neither has been selling in the export field except through the British-American.

Mr. Hornblower admits that the object of the combination was to put an end to a ruinous competition; but he limits it to a ruinous competition which was being carried on in Great Britain alone, and would have you infer from the evidence that the whole purpose of these agreements was to end the competition existing between Ogden's Limited and the Imperial Company. But it is perfectly obvious from an examination of this record and from the contracts, that that was the least of the considerations that these gentlemen had at that time. Their views were not circumscribed by that tight little island. They had the imperial vision, and the whole world was their field; and the purpose of these agreements was to parcel it out among themselves; and in the execution of that agreement they have not only controlled and regulated trade and commerce in tobacco leaf between Great Britain and the United States, but they have absolutely come in the United States and regulated the purchase of leaf tobacco. The British-American Tobacco Company has acquired control of the stock of two Virginia corporations, and is carrying on certain operations in the United States by means of the exercise of the ownership of that stock.

His honor the Chief Justice, asked me, yesterday, at some time during my argument to answer the question whether or not the defendants were obliged to continue in a destructive competition, or whether they were justified in stopping destructive competition.

Mr. Justice McKenna. Ruinous competition?

Mr. Wickersham. Yes; ruinous competition. It seems to me that the answer is given by Judge Taft, in writing the opinion in the Addyston pipe case, where he says:

"We can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law because in restraint of trade and tending to a monopoly." (85 Fed., 291.)

Is there not another consideration? Parties are not obliged to go into destructive competition. It is nothing but excessive greed that leads them into destructive competition; and if a conclusive answer to the charge of entering into an agreement to restrain interstate trade contrary to the Sherman Act is found in the fact that the parties had to do it in order to terminate the destructive competition which excessive greed of one or more of them had led them into, and that is to be sufficient, the Sherman Act had better be blotted from the books, because you could scarcely conceive of any condition in which the destructive competition might not grow up if the result

was to be followed by complete success in extinguishing all competition through combination or otherwise.

Mr. Justice HOLMES. Do I understand that you may extinguish it the other way?

Mr. WICKERSHAM. By stopping.

Mr. Justice HOLMES. You may extinguish it the other way by killing one of them.

Mr. WICKERSHAM. There are laws against unfair trade, laws against homicide, and laws against suicide; and it may be dealt with, it seems to me, in various ways. Take the original competition of the five companies that formed the American Tobacco Company. They were engaged in bitter competition. They expended a large amount of money during the last year before they came together in advertising which they saved the moment they got together, and they, every one, profited. No one of them was near the auction block.

The CHIEF JUSTICE. You say "bitter" now. The other day you said "ruinous."

Mr. WICKERSHAM. I say "bitter." It would have been ruinous if they had gone on, perhaps. But it was ruinous. Any competition that involves the expenditure of an amount of money which is excessive in comparison with the returns would be destructive, and if continued long enough somebody would be destroyed.

Mr. Justice HOLMES. If one of those people as the result of the competition had gone out of business, would that have been a result achieved in contravention of the Sherman Act?

Mr. WICKERSHAM. I should not like to say so, unless there was something more than the ordinary, legitimate pushing of wares, their quality, advertising their excellence, and appealing more widely to the consumers.

Now, upon all the considerations which we have submitted to the court it seems to the Government that the case is fully made out both under the first and under the second sections of the act. I have not time to discuss, nor would it seem to be necessary to discuss, the question whether or not the defendants are engaged in interstate commerce, because the course of trade, as the evidence discloses here, is within all the decisions of this court a course of interstate commerce; and whatever effect the combination and agreements before the court here has had, it has an effect upon commerce among the States and with foreign countries in the article dealt in; and the proposition that the Knight case is controlling, and that these companies must be treated, for the purpose of interstate commerce, as though they were simply manufacturers, and that this was a compact of simple manufacturers, is one that I take it need not be seriously considered at this late day.

IN THE 1

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Appellant, vs. THE AMERICAN TOBACCO COMPANY and others, Appellees.	Number 316.
THE AMERICAN TOBACCO COMPANY and others, Appellants, vs. THE UNITED STATES OF AMERICA, Appellee.	Number 317.

2

PETITION.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES: 3

The petition of William Bourke Cockran, a citizen of the State of New York, for leave to submit a brief in this case for consideration by your Honors, respectfully shows:

The Circuit Court of Appeals in adjudging the corporation known as The American Tobacco

4 Company to be a contract, combination or conspiracy in restraint of trade within the meaning of the Sherman Law, bases its decision not on any specific acts committed by the corporation after its organization, but on the ground that the very object of its formation was the absorption of several companies which formerly had competed with each other, and that such a consolidation was a violation of the law.

One step towards the consolidation thus condemned by the court was the purchase of the Union Tobacco Company (Record, Vol. 1, p. 36). Your petitioner was one of the organizers of that corporation. See testimony of William H. Butler:

5 "Q. Who were the principal parties associated with you in the Union Tobacco Co.? A. Well, there was Gen. Sam. Thomas, W. Bourke Cockran, Thos. F. Ryan, P. A. B. Widener, W. L. Elkins, and some others whose names escape me for the moment, but, as I say, they are all matters of record."

(Record, Vol. 3, p. 405 *et seq.*)

Your petitioner also joined in the sale of that corporation to the defendant, The American Tobacco Company.

It is true that he did nothing to bring about the consolidation of these two corporations. In fact, he was opposed to it, and would have much preferred that it had not taken place. Nevertheless, he acquiesced in it, and pursuant to the terms 6 on which it was arranged he exchanged the stock held by him in the Union Tobacco Company for stock of The American Company.

If this acquisition of one corporation by the other were really a step in a criminal conspiracy, as has been held by the court below, then your petitioner and all other parties directly concerned in the sale of the Union Tobacco Company to the defendant, The American Tobacco Company, were parties to that offence against the law.

When your petitioner consented to the sale of the

Union Tobacco Company, as aforesaid, he was not 7
ignorant or unmindful of the Sherman Law. He did not believe that acquisition of the Union Tobacco Company by The American Tobacco Company under the circumstances described in the record, was a contract, conspiracy, or combination in restraint of trade, nor that it was in any sense unlawful. He does not believe now that it was an act which either the statute law forbade or the moral law condemned.

Long before the beginning of this action, your petitioner disposed of the stock held by him in the defendant company, and since that time he has had no relations whatever with its officers, except that he conducted some legal proceedings against 8
them. He never received any notice that this action was pending. He had heard that some proceedings had been instituted against The American Tobacco Company by the Government of the United States, but until he read the decision of the Circuit Court of Appeals he never suspected that the ground of attack was the object for which the corporation had been formed, but always assumed the cause of prosecution was some acts committed in the course of its operations. He had no knowledge whatever that his name had been mentioned during the trial, until long after the Court below had rendered its decision, when having read the opinions, he was led to examine the evidence on which they rested, and then 9
he learned for the first time that absorption of the Union Tobacco Company by the defendant, The American Tobacco Company, in which your petitioner participated as aforesaid, was one of the acts adjudged to be in violation of the Sherman Law.

The interpretation, understanding or view of the Sherman Act which governed your petitioner throughout this whole transaction, and under which he believed and now believes his every act in the premises was fully justified in law and in morals, was not presented to the Circuit Court of Appeals, as far as he can ascertain from the briefs

10 submitted by counsel, or the opinions rendered by the Judges, all of which he has read.

The question which this Court must determine on this appeal is whether a transaction in which your petitioner participated was lawful or criminal. If it constitute a crime, there can be no question that he was a party to it. It is true that before he could be disturbed in his liberty or property he must first be afforded a day in court, but the only issue that could be raised on such a prosecution is whether these acts in which he neither could nor would deny participation are lawful or unlawful, and that is precisely the question that must be decided now in disposing of this appeal.

11 Your petitioner therefore asks that before your Honors determine a question of such vital importance to him, he be allowed to submit in writing the reasons why he believed the organization of The American Tobacco Company was entirely lawful, and why he does not believe now that in promoting one feature of it he was violating the provisions of any statute, or disregarding any obligation of good citizenship.

All of which is respectfully submitted.

W. BOURKE COCKRAN,
Petitioner,
31 Nassau Street,
New York.

12

City and County and State of New York, ss.:

WILLIAM BOURKE COCKRAN, being duly sworn, deposes and says, that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the statements of fact therein contained are true.

W. BOURKE COCKRAN.

Sworn to before me this 30th day of December, 1909.

WILLIAM H. DIXON,
[SEAL.] Notary Public,
N. Y. Co.

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IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Appellant, vs. THE AMERICAN TOBACCO COMPANY, and Others, Appellees.	Number 316.
THE AMERICAN TOBACCO COMPANY, and Others, Appellants, vs. THE UNITED STATES OF AMERICA, Appellee.	Number 317.

Brief and Argument submitted by Wm. Bourke Cockran in support of his petition filed herein.

It is not intended to discuss here whether the nature of the defendant's business is such as to bring it within the jurisdiction of Federal courts. That question was fully argued and exhaustively examined in the court below.

For the purpose of this brief, it will be assumed that the corporations condemned by the Circuit

Court of Appeals are engaged in interstate commerce.

On the other hand, it is contended:

FIRST.—That the American Tobacco Company, neither by its original organization, nor by its subsequent acquisition of other companies was, is, or in the nature of things could be, a contract, combination, or conspiracy in restraint of trade, such as is condemned by Section 1 of the Sherman Law.

SECOND.—That it is not such an attempt to monopolize any article of commerce as is forbidden by Section 2 of the same Act.

FIRST POINT.

It being undisputed that the object for which the defendant companies were formed was to augment the production of tobacco by employing in manufacture vast sums previously wasted in unproductive advertising, and the Circuit Court having held that their operation has actually resulted in largely expanding trade in tobacco, it was manifest error to adjudge them a combination, contract or conspiracy in restraint of trade. For an industrial organization could not at the same time expand trade and restrain it.

This would seem to be a self-evident proposition. Yet it is precisely the proposition which is controverted, impeached and contradicted by the de-

cision of the Circuit Court of Appeals now under review.

According to all the evidence,—that adduced by the government as well as by the defendants,—The American Tobacco Company was originally formed for the purpose of ending (by combining several companies into a single organization), a fierce trade war through which vast sums of money were diverted from manufacture and wasted in useless and meretricious advertising.

(*Testimony of Kinney, Vol. 2, p. 532, fol. 3. Testimony of Butler, Vol. 3, p. 401, fols. 3-4. Testimony of Duke, Vol. 4, p. 340.*)

On the theory underlying this brief, it is to be regretted that the record fails to show clearly the character of this advertising—which was notorious at the time—nor the extent to which it consisted, not of publications in newspapers, but of placards and prints offensive alike to morals and good taste, lavishly displayed in shop windows and other conspicuous places.

Enough appears in the evidence, however, to establish beyond all question that the waste from this source amounted to twenty per cent. of the gross sales.

(*Testimony of Kinney, of Butler and of Duke, supra.*)

After the organization of the defendant company, its advertising was confined to ordinary methods. The huge sums formerly wasted in questionable displays were thereafter employed in manufacture, and in extending the sales of its various manufactured products. The direct and obviously inevitable result was an enormous increase in the volume of production extending to every form of tobacco,—manufactured and unmanufactured,—and a corresponding increase in the volume of sales. The in-

crease thus begun has continued steadily ever since, as other companies were acquired.

As to all this, the testimony is absolutely unanimous. It is established by the tables which constitute part of the government's case (*see Government Exhibits Nos. 76 to 86, both inclusive*), and it is found expressly by all the judges in the Circuit Court of Appeals.

Judge Lacombe, in his opinion, says:

> "During the existence of The American Tobacco Company new enterprises have been started—some with small capital in competition with it and have thriven. The price of leaf tobacco—the raw material—except for one brief period of abnormal conditions, has steadily increased until it has nearly doubled, while at the same time 150,000 additional acres have been devoted to tobacco crops and the consumption of the leaf has greatly increased. Through the enterprise of defendant and at large expense new markets for American tobacco have been opened or developed in India, China and elsewhere." (Record, Vol. 1, p. 293.)

Here the court finds unqualifiedly that the existence and operation of The American Tobacco Company has caused an enormous increase in the production of tobacco in all its branches and forms,—alike in the agricultural and the manufactured product, and in a wide expansion of the tobacco trade, foreign and domestic. Yet the industrial organization which has resulted in this extraordinary *increase of trade* is condemned, prohibited and enjoined on the ground that it is a combination, contract, or conspiracy in *restraint of trade.*

Such a decision would be utterly incomprehensible were it not that the opinions of the judges enable us to realize how they reached this conclusion.

These learned judges unite in disclaiming all responsibility for the doctrine on which their decision is based. They say in effect that this court, in the course of various decisions, has read into the Sherman Law certain words which the legislative body never included in it—which certainly cannot be found in the Act itself—and that in deciding this case as they did, they were but enforcing the law, not as they themselves might have construed it, but as this supreme judicial authority has established it.

The first section of the statute, by its terms, declares illegal and forbids, *"every contract, combination in the form of trust or otherwise, or conspiracy IN RESTRAINT OF TRADE OR COMMERCE among the several States or with foreign nations."* That is the full extent of its prohibition. This court, according to the decision now before it for review, has amended, or at least extended, this prohibition by adding to it a prohibition against contracts, combinations, or conspiracies IN RESTRAINT OF COMPETITION. Of course, if restraint of competition and restraint of trade mean the same thing—if in fact they are convertible terms—the court did not change the scope or extend the prohibitions of the statute by merely using one expression instead of the other. But the record shows clearly that in this case the court treated restraint of trade as something entirely distinct from restraint of competition. It is as a restraint of competition, not as a restraint of trade, that the defendant is condemned, according to the opinions of all the judges concurring in the judgment.

That there may be no misapprehension about this, it is well to reproduce textually the language of each judge with respect to it.

Judge Lacombe, immediately after the statement quoted above, showing the enormous increase of

trade caused by the existence of the defendant, adds these significant words:

> "But all this is immaterial; each one of these purchases of existing concerns, complained of in the petition, WAS A CONTRACT AND COMBINATION IN RESTRAINT OF A COMPETITION existing when it was entered into, and that is sufficient to bring it within the ban of this drastic statute." (Record, Vol. 1, p. 293.)

The earlier part of his opinion is devoted to explaining that this conclusion is not his own, but one imposed on him by decisions of this court. He opens by quoting the first section of the Sherman Law and then says:

> "That declaration, ambiguous when enacted, is, as the writer conceives, no longer open to construction in the inferior Federal courts. Disregarding various dicta and following the several propositions which have been approved by successive majorities of the Supreme Court, this language is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers, however small. As thus construed, the statute is revolutionary."
>
> (Record, Vol. 1, p. 291.)

According to this construction of the Sherman Law, its main purpose is not so much to prohibit combinations in restraint of trade as combinations in restraint of *competition*. No matter how widely a business organization may expand trade by its natural operations, it must, nevertheless, be condemned and destroyed, if in effecting that expansion it lessens competition to any degree. In other words, according to the intent and purpose of this law, as construed by the Circuit Court of Appeals, it is more important that competition be main-

tained at the fiercest than that trade be extended to the utmost. For, here is an industrial concern which had for the very object of its organization expansion of trade and which by its actual operations, has increased the volume of trade enormously and continuously, yet because it is believed to have discouraged or lessened competition in some degree, it is adjudged an offence against the law and as such is condemned and enjoined.

BUT TO ENJOIN AN INDUSTRIAL SYSTEM OR ORGANIZATION WHICH OPERATES STEADILY AND POWERFULLY TO EXTEND TRADE IS BY THAT VERY INJUNCTION TO RESTRAIN TRADE. THIS IS PRECISELY WHAT THE CIRCUIT COURT OF APPEALS SEEKS TO DO HERE. TO ENFORCE A STATUTORY PROHIBITION AGAINST RESTRAINT OF TRADE, THE COURT ITSELF IS ACTUALLY UNDERTAKING TO RESTRAIN TRADE—DOING THE VERY THING WHICH THE STATUTE FORBIDS, IN ORDER TO PREVENT SOMETHING—*I. E.*, DIMINISHING COMPETITION—WHICH THE STATUTE DOES NOT EVEN MENTION.

However extraordinary this conclusion may appear,—however radically it may seem to misapprehend or pervert the plain terms of the statute,—still, if in fact it merely enforces the law as it has been defined and construed by this supreme tribunal, the time for argument is past; obedience has become the duty and the task of every citizen.

But is it true that this decision merely enforces principles of law embodied in prior decisions of this court?

Before answering this question, it is well to ascertain the full significance and necessary effect of the construction attributed to this tribunal by the judges who rendered this decision.

The learned judge already quoted, after stating that the defendant claims its manner of organization and system of doing business are THE ONLY WAY by which *"production can be increased and cheapened, new markets opened and developed, stability and reasonable prices secured, and industrial progress assured,"* (the very essentials of prosperous and expanding trade), proceeds to say:

> "But every aggregation of individuals or corporations, formerly independent, immediately upon its formation terminates an existing competition, whether or not some other competition may subsequently arise. THE ACT, AS ABOVE CONSTRUED, PROHIBITS EVERY CONTRACT OR COMBINATION IN RESTRAINT OF COMPETITION. SIZE IS NOT MADE THE TEST. TWO INDIVIDUALS WHO HAVE BEEN DRIVING RIVAL EXPRESS WAGONS BETWEEN VILLAGES IN TWO CONTIGUOUS STATES, WHO ENTER INTO A COMBINATION TO JOIN FORCES AND OPERATE A SINGLE LINE, RESTRAIN AN EXISTING COMPETITION, AND IT WOULD SEEM TO MAKE LITTLE DIFFERENCE WHETHER THEY MAKE SUCH COMBINATION MORE EFFECTIVE BY FORMING A PARTNERSHIP OR NOT.
>
> Accepting this construction of the statute as it would seem this court must accept it, there can be little doubt that it has been violated in this case."
>
> (Record, Vol. I, p. 292.)

If diminution of competition in some particular case has necessarily operated to promote trade, that fact he expressly holds to be entirely immaterial. In his own words:

> "What benefits may have come from this combination or from the others complained of, it is not materal to inquire, nor need subsequent business methods be considered,

NOR THE EFFECTS ON PRODUCTION OR PRICES."

(Record, Vol. 1, p. 292.)

Judge Noyes begins his opinion by renouncing utterly the right of the courts (under decisions of this tribunal) to consider the actual effect of any combination on trade itself. The right to *"draw a line between these combinations which work for good and those which work for evil"* as he phrases it is held to be a legislative, not a judicial question.

(Record, Vol. 1, p. 306.)

After citing many cases decided by this Court, he says:

> "This construction of the statute confines the duty of this court in applying it within very narrow limits. WE HAVE ONLY TO INQUIRE WHETHER THE EVIDENCE SHOWS A COMBINATION RESTRICTING COMPETITION. THERE IS NO NECESSITY FOR GOING FURTHER. OTHER INQUIRIES ARE IMMATERIAL. The combination may not reduce the prices paid to the growers of raw material; may not increase the prices charged to consumers; may not seek to exclude all others from the field; may be free from coercion or oppression; and yet if it restrict competition, if it restrain trade, reasonably or unreasonably, it falls within the statute. The statute declare unlawful every combination in restraint of trade. IT CONTAINS NO WORDS OF LIMITATION OR QUALIFICATION, AND THE SUPREME COURT OF THE UNITED STATES HAS DECIDED THAT THE COURTS HAVE NO RIGHT TO ATTACH THEM TO IT."
>
> (Record, Vol. 1, p. 314.)

Here it will be observed this tribunal is quoted as having held that the courts are without author-

ity to reduce the scope of the law by *"adding words of limitation or qualification"* to it, and yet this same decision holds that this court has extended the scope of the law by injecting two entirely new words into the body of it, and by adding a syllable of much significance to one of the words already contained in it.

Judge Lacombe, as we have seen, says specifically that the language of the Sherman Act in the light of decisions by this body *"is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to* DEPRIVE THE COUNTRY OF THE SERVICES OF ANY NUMBER OF INDEPENDENT DEALERS, HOWEVER SMALL" (Record, Vol. 1, p. 291).

From this language and that of Judge Coxe which follows, it appears that not merely is a prohibition against restraint of competition added by judicial interpretation to the prohibition against restraint of trade enacted by Congress, but these learned judges have also added to the law or discovered in it, a prohibition against anything that might reduce the number of dealers even by one. Restraining the volume of *trade,* it would seem, is not what the statute prohibits, so much as restraining the number of *traders.*

Judge Coxe, in his opinion, says:

> "Since 1890 this vast interstate and foreign trade which was formerly carried on by this large number of competing companies and individuals is now carried on by one combination. The free interchange of commerce has been interfered with, hampered, diverted, and, in some instances, destroyed. Though it may be greater in volume, it does not flow through the old channels; it is not free and unrestrained."
>
> (Record, Vol. 1, p. 296.)

This learned Judge, it will be observed, appears to go still further even than his two associates in amplifying the scope of this law. He seems to hold that not merely must competition be maintained at its fiercest and the number of traders at the maximum (diminution of either, however slight, being an offense against the law), but *"the old channels"* (whatever that may mean) must remain undisturbed. No actual increase of trade, it seems, is to be weighed against the supreme duty of maintaining these mysterious, undefined—perhaps undefinable—"old channels." *"Though it"* (commerce) *"may be greater in volume,"* he says, *"it does not flow through the old channels; it is not free and unrestrained."*

It is certainly impossible to find in the statute any specific provision that trade must be suffered to flow in any particular channel, or that it is to be considered free and unrestrained only while it continues in *"the old channels."* Nor it is easy to conceive any reason for such a prohibition. If its new channels be wider and broader, surely the current of trade need not be less free, nor less unrestrained, than in older and narrower channels.

Until this act came before the courts for interpretation it had been the unbroken rule of construction that every penal enactment must be strictly construed.

In the words of Chief Justice Marshall:

> "The rule that penal laws are to be con-
> "strued strictly is perhaps not much less old
> "than construction itself."
>
> U. S. *v.* Niltberger, 5 Wheaton, 95.

In construing this particular law, however, according to the Circuit Court of Appeals, that rule must be reversed. Instead of con-

struing it strictly, it must be construed with liberality—an extraordinary liberality—a liberality which, if it can be limited at all, is to be measured, it would seem, only by the resources of rhetoric. But to construe a penal law liberally is to increase the number of acts which may be punished as offences against it beyond those specified in the statute itself, and at the same time to leave uncertain what acts are lawful and what acts may be denounced as crimes.

Under this construction of the law we are now considering, it is clear that a person who has scrupulously refrained from doing all of the things expressly prohibited by it, may nevertheless find himself exposed to injunction by courts of equity, and to conviction by criminal courts for doing any one of three things which the statute does not even mention.

Though his activities, far from restraining commerce, have operated to enlarge it, yet if in the pursuit of his business he happen to mitigate in any degree the activity of competition, or reduce even by one the number of dealers engaged in some branch of trade, he must be restrained by writ and pursued by criminal process. Even if he succeeded in avoiding all these perils, he could not feel himself absolutely secure. If by anything he did, trade was even disturbed in *"the old channels,"* he might still find himself the object of an injunction, possibly of an indictment. With such pitfalls besetting his footsteps on every side, it must be difficult, if not impossible, for any citizen, however well-disposed, to avoid stumbling repeatedly into commission of offences against the law.

And it must be borne in mind that the resources of rhetoric are not by any means exhausted. What additional offences against this statute may yet be evolved by this new process of liberal construction it is impossible to say. Disturbing *"the old chan-*

nels" is doubtless but one of many acts whose heinousness, as yet unsuspected, will soon be discovered and proclaimed, and many men called to answer for them who are now unconscious that they have been perpetrating criminal offences.

There is one objection to this new principle of construction, which is here most respectfully submitted.

If it be upheld by this court, then the citizen can no longer depend for security from attack in the courts on his own disposition to obey every law of his country. No desire, however earnest, to avoid crime will suffice to keep a man from perpetration of crime. Obedience to law becomes matter, not of conscience, but of casuistry. Only the casuist will be able to discover what is forbidden and what permitted. Indeed, it is doubtful if casuistry, however acute, could always discern the line between obedience and disobedience. For here, in this very case, the Circuit Court of Appeals decides that this Court has reversed, in effect, its decision in the E. C. Knight case, while another Circuit Court of Appeals insists that the Knight case is still in full force.

Bigelow *v.* Calumet & Hecla Mining Co. *et al.*, 167 Fed. Rep., 721-725, Opinion of Lurton, *C. J.*

When two of the highest judicial bodies in the land differ so radically, not merely on the meaning of the statute, but about the meaning of different interpretations placed on it by this Court, how can an average citizen hope to ascertain with any degree of certainty precisely what the law enjoins or forbids, so that he may obey its injunctions and respect its prohibitions?

WHATEVER JUSTIFICATION THERE MAY BE FOR CONSTRUING THE SHERMAN LAW TO EMBRACE A PROHIBITION AGAINST

EVERY RESTRAINT OF COMPETITION AS WELL AS AGAINST ALL RESTRAINTS OF TRADE, IT CERTAINLY IS NOT CORRECT TO SAY THAT SUCH A CONSTRUCTION WAS IMPOSED UPON THE JUDGES OF THE CIRCUIT COURT OF APPEALS BY PRIOR DECISIONS OF THIS TRIBUNAL.

Indeed, such a position would seem to have been expressly negatived in the Joint Traffic Association case.

Counsel there having urged the Court to reverse or modify its prior decision of the Trans-Missouri case on the ground that if it were allowed to stand many contracts and systems of industrial organization essential to the very existence of commerce must also be declared unlawful, since they all involved diminution of competition in some degree (some of their hypothetical cases seem to have anticipated this one), Mr. Justice Peckham declared such an assumption to be "VIOLENT" and "ONE NOT CALLED FOR OR JUSTIFIED BY THE DECISION MENTIONED OR BY ANY OTHER DECISION OF THIS COURT."

He added:

> "They admit that if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. COUNSEL THEN ADD (AND THEREIN WE ENTIRELY AGREE WITH THEM) THAT NO SUCH IDENTITY CAN BE PRETENDED, BECAUSE IT IS PLAIN THAT COMMERCE CAN AND DOES TAKE PLACE ON A LARGE SCALE AND IN NUMEROUS FORMS WITHOUT COMPETITION."
>
> U. S. *v.* Joint Traffic Asso., U. S. Sup. Ct. Rep., 171, p. 575.

The widest significance or scope ever given to this statute, in any utterance approved by a majority of

this court, is embodied in the opinion of Mr. Justice Peckham deciding the Trans-Missouri case, reiterated in the Joint Traffic Association case, that while unreasonable restraints of trade have always been obnoxious to the common law, this statute forbids all restraints, whether reasonable or unreasonable.

From this construction four justices dissented, whose views were expressed most forcibly by Mr. Justice White.

Subsequently, Mr. Justice Brewer, who had concurred with the majority in the disposition of these two cases, took occasion to say that while he still believed they had been correctly decided, he no longer wished to be understood as sharing the view embodied in the prevailing opinion, that this statute forbade all restraint of trade, whether reasonable or unreasonable. In his own words:

> "Instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld."
>
> (Opinion of Mr. Justice Brewer, Northern Securities Co. *v.* United States, 193 U. S., p. 361.)

Mr. Justice Harlan, speaking for three of his associates, as well as for himself, in the Northern Securities case did indeed use words which seem to imply that competition and trade are equivalent terms within the meaning of the Sherman Act, and therefore, that restraint of one involves restraint of

the other. But this language cannot be taken as a deliberate decision of so grave a question by this Court for two reasons: first, it did not profess to voice the views of a majority, but only of four members.—Mr. Justice Brewer, as we have seen, dissented specifically from this part of the opinion—, and second, the crucial question then before the Court was, not the effect of competition generally on trade, but whether railways could do, through the medium of a holding company, that which this Court had decided in the Trans-Missouri case and the Joint Traffic Association case they could not lawfully do by agreements between themselves.

In these two cases, the question at issue was whether corporations chartered by government to compete in transporting persons and merchandise between different states could, by agreement among their officers, change their relations to the people and to each other so that instead of the competing enterprises they were chartered to be, they would practically have become co-operating enterprises by their own action.

This court held very properly that any agreement which might operate to prevent such a corporation from offering the people transportation at the very lowest rates within its power, without waiting for the assent, approval or co-operation of any other corporation, was a restraint of trade within the meaning of the Sherman Law.

But the extent to which government may control agencies of its own creation charged with functions essentially public, presents a totally different question from the right of government to control the trade operations of individuals or of corporations engaged in ordinary production.

Gibbs *vs.* Consolidated Gas Co., 130 U. S., 396.

Opinion of Mr. Justice Peckham in Trans-Missouri case, 166 U. S., p. 333.

Interference by government with the business of individuals subject to its jurisdiction is a thing not to be lightly undertaken. Before the courts will disturb contracts or business organizations because they tend to restrain *not trade but competition*, the intention of the legislature to authorize their interference on that ground must be manifest and clear; it is not to be presumed, nor read by judges into an act where it is not stated in unmistakable terms.

WHAT THEN DOES THIS STATUTE PROHIBIT?

This question is admirably answered in one part of the opinion rendered by Judge Coxe in this case, wherein he says:

> "The Anti-Trust Act embraces and declares to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of interstate or international trade or commerce. The act is not limited to unreasonable restraints, but embraces all direct restraints."
>
> (Record, Vol. 1, p. 299.)

Here we find no mention of *"competition," "independent dealers,"* or *"channels,"* old or new. The law is stated lucidly, completely and correctly as it has been interpreted on various occasions by this Court.

But in the very next paragraph we can see how that learned judge, by improvident use of a single word, has slipped from this solid ground of clear definition to an unstable region of vague statements, uncertain premises, and erroneous, not to say extravagant, conclusions. He says:

> "The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of com-

petition restrains trade and commerce." (Record, Vol. 1, p. 299.)

If by "the *natural* effect of competition" the learned judge means the *necessary* effect of competition, the statement is erroneous. It is contradicted and completely refuted by this very decision which holds that the American Tobacco Company does limit competition, but that far from restraining, it extends commerce enormously. If, however, by "the *natural* effect of competition," he means the *usual* effect of competition, his statement is entirely correct. The usual effect of competition is indeed to increase commerce. But that is by no means its inevitable effect, as this very case conclusively shows.

Had the learned judge employed the proper word, he must have seen at once that even though the USUAL effect of competition is to increase commerce, it by no means follows that EVERY *"agreement whose direct effect is to prevent this play of competition restrains trade and commerce."*

Bearing in mind that the thing actually prohibited by the *words* of the statute is a *"contract, combination in the form of trust or otherwise, or conspiracy in restraint* OF TRADE OR COMMERCE *among the States or with foreign countries,"* confusion of thought will be dispelled and extravagant or erroneous conclusions avoided, if we begin by ascertaining and defining just what is meant by "trade," or "commerce." The true relation that competition bears to it will then be obvious.

It is elemental to say that trade is exchange of commodities. Commerce, as defined by this Court, has a wider significance. It embraces and extends to all intercourse between communities, States or countries. Commerce, under every definition, of course, includes trade, which is always its chief ele-

ment. As it is trade which defendant has restrained, if it has been guilty of exercising restraint in any direction, this inquiry will be confined to the effect of its operations on trade.

Trade being exchange of commodities, it must be obvious that the essential of prosperous trade is extensive production of commodities. Commodities must be produced before they can be exchanged. There may be production without exchange (in a savage state everything a man possesses is the product of his own hands), but there cannot be exchange without production.

While, theoretically, it is conceivable that there may be production without exchange, yet in every civilized society the main object of production must be exchange. No civilized man produces all that he consumes. It is by exchanging what he produces for what he needs that he obtains the necessaries, the comforts and the luxuries of life. Manifestly, where production is abundant, exchange must be extensive. Conversely, if exchange be restricted, production must be discouraged and diminished, for, generally speaking, men will not produce by labor what they cannot exchange through commerce.

In the light of these elemental truths (which there would be no excuse for enumerating here were it not that they seem to have been completely overlooked by the Circuit Court of Appeals) the prohibition of this statute is perfectly plain and perfectly intelligible. The thing it forbids must be something that *may* operate to restrain or embarrass trade—that is to say, the exchange of commodities—and exchange of commodities cannot be restrained without discouraging the production of commodities.

CLEARLY THEN WHAT THIS LAW PROHIBITS IS ANYTHING AND EVERYTHING IN THE NATURE OF CON-

TRACT, PLAN, COMBINATION OR CONSPIRACY, INDUSTRIAL ORGANIZATION OR SYSTEM OF BUSINESS, THAT WILL OR THAT MAY RESTRAIN INTERSTATE OR FOREIGN *TRADE* OR *COMMERCE,* THAT IS TO SAY, ANYTHING THAT MAY DISCOURAGE THE PRODUCTION OF COMMODITIES BY RESTRAINING OR EMBARRASSING EXCHANGE OF THEM AMONG THE STATES OR WITH FOREIGN COUNTRIES.

Under this construction the Sherman Law is neither "revolutionary" nor "drastic," as Judge Lacombe describes it. It is not even new in the sense of embodying any novel principle of government. Power to prohibit anything that might restrain production of commodities as well as exchange of them, is essential not merely to the efficiency of government in any form, but to the very existence of civilization itself.

The first object of government is, of course, to preserve peace, but peace is valuable mainly because it enables men by co-operation in production to draw from any given portion of the earth sustenance for a larger number of human beings than the same territory or country could support in a state of barbaric strife.

It is doubtful if the whole territory of the United States, on which nearly a hundred million human beings live in abundance through industry, could afford subsistence to half a million savages compelled to live by the chase. Yet this soil embraces no element of natural advantage now that it lacked when it afforded but a scanty subsistence to a few savage tribes. The element which makes it capable of supporting in comfort the vastly greater number that actually inhabit it is simply the opportunity to co-operate in production, which is afforded them by government—that is by civilization. Civilization in the last analysis may be defined as the economical,

and barbarism as a wasteful use of the earth. As civilization expands new and more effective methods of industrial co-operation will undoubtedly be discovered, and a still larger volume of commodities drawn from the earth, so that many hundred additional millions will be supported on this same territory in even great abundance than we enjoy to-day. Anything that may tend to restrict production of commodities available for the support and comfort of human beings is, therefore, an offense against civilized society, which government, —the chief agency and fruit of civilization,—by the very law of self-preservation is bound to check and prevent.

While it is the capital interest of society that means of subsistence should be abundant, some men have always sought exaggerated profits for themselves in artificial restraints of trade and these, by causing restriction of production, operate necessarily to induce scarcity of commodities.

Scarcity of commodities is but another term for "industrial prostration," or "hard times." Scarcity in aggravated form is famine, and famine is one of the three capital calamities that can befall human beings. Scarcity or famine may occur at any time through act of Providence, despite all efforts of civilized society to avert it. But so far as either can be averted by human precautions, it is essential to the very existence of humanity that these precautions be taken by the highest authority and in the most effective form that society can establish. Government in every form of society must therefore possess power to prevent artificial restraints of trade that entail scarcity. Laws prohibiting contracts in restraint of trade are but the exercise of this power.

The idea that prohibitions of contracts, combinations or conspiracies in restraint of trade are new

features of legislation in this country or in England, though entirely erroneous, appears to be widespread. It explains perhaps some of these novel —not to say extravagant—notions of construction which the Sherman law seems to have inspired.

Contracts in restraint of trade have never been tolerated in England. They were not made illegal by any statute. They were always illegal under the common law.

When in the case brought before the King's Bench during the reign of Henry V. (which is universally recognized as the first judicial attempt to deal with restraints of trade in England), the Lord Chief Justice dismissed the complaint and threatened the plaintiff with imprisonment for entering into a contract by which another man had bound himself not to engage in the trade of a dyer, his decision was not based on any statute which made such agreements unlawful, but on the common law by which they had always been condemned.

In all the remonstrances, petitions and statutes passed by the English Parliament against monopolies, it is impossible to find a single enactment making future restraints of trade unlawful. Monopolies and restraints of trade are declared in all of them to have been always against the ancient laws and customs of England. During the reign of Elizabeth, these monopolistic restraints of trade were objects of attack in nearly every Parliament, and although the language of the remonstrances addressed to the throne reflect the mingled terror, reverence and affection which that princess inspired, not one of them acknowledged even by silence that the prerogative of the Crown could be lawfully exercised to restrain trade.

The great statute of monopolies passed in the reign of James I. enacts "that all monopolies, etc., ought to be and shall be forever hereafter examined,

heard, tried and determined by and according to the common law of the nation and not *otherwise.*"
(*21 Jac. I, Chap. 3.*)

When subsequently, a company which for nearly one hundred years had held by grant from the Crown an exclusive right to trade with the East Indies, brought action for violation of its patent against one Sandys, the case which became known as "the great case of monopolies," was argued in the court of King's Bench by some of the greatest lawyers who have ever adorned the English bar. Their arguments *in extenso* are reproduced in Cobbett's State Trials, and all of them—Holt, afterwards Lord Chief Justice—Finch, Solicitor General, afterwards Earl of Nottingham—and the Attorney-General, Sir Robert Sawyer—for the plaintiffs—and Sir George Treby, afterwards Lord Chief Justice—and Pollecfin, for the defendants—agreed that everything in the nature of a monopoly or restraint of trade had always been repugnant to the common law of England.

Though the Court gave judgment sustaining the patent on the ground that it had existed for one hundred years, and that through its operation the whole trade with the East Indies had been opened and established (a doctrine not dissimilar to that underlying our patent laws), yet Jeffreys, the Lord Chief Justice, in an exhaustive and very learned opinion, showed not merely that monopolies in restraint of trade had always been forbidden by the common law, but that they had been condemned under every form of government known to history and at that time—1684—were prohibited expressly by the laws of every civilized country.

(*The Governor and Company of Merchants of London trading to the East Indies* vs. *Thomas Sandys*, Cobbett's State Trials, vol. X, p. 519.)

Recent researches of Assyriologists show that restraints of trade had been forbidden at a period

far earlier than any of which men had knowledge at the time of Jeffreys.

The Code of Laws promulgated by Hummurabi, King of Babylon, B. C. 2285-2242—the oldest legislation in human annals—enacts:

Section 65: "If the gardener does not farm the garden and has diminished the yield he shall measure out the yield of the garden like its neighbors."

Textes Elamites—Semitiques des memoirs de la Delegation en Perse, Tome IV. Paris, Leroux, 1909.

Translation of Prof. C. H. W. Johns. Edinburgh, T & T. Clarke, 1905.

Power to forbid restraints of trade by the very nature of things is possessed by government here as in every other civilized society. But under our dual system this power is divided between the State and the Federal authorities. If the Federal government were given complete control of trade (intrastate as well as interstate and foreign), doubtless that would embrace jurisdiction over all production. Complete control of all trade could not be effective unless it embraced control of its essential element, production.

But as Mr. Justice Lamar pointed out (Kidd *v.* Pearson, 128 U. S., 1) if any semblance of authority is to remain with the State government, it must exercise absolute and exclusive jurisdiction over production within its own borders. For production embraces every form of industrial effort, and if the Federal Government were empowered to exercise jurisdiction over the industrial efforts of men it would practically be in complete control of all their actions.

It may be that it would have been better if the Federal government were given complete jurisdiction over all trade, but that is not a question that can be discussed here. The function of this Court is not to make a Constitution but to declare it ex-

actly as it was framed by the founders, and adopted by the States.

While the Constitution has not given the national government authority to enter a State for the purpose of encouraging or protecting production, or regulating the exchange of its industrial products within the limits of its own territory, it confers full power on the Federal authority to deal with exchange of commodities among the States or with different States.

This interpretation of the statute is the plain and inevitable deduction from every utterance of this Court on the subject. In the light of it, there is not, as some believe—as the judges below assert—either confusion in the opinions or contradiction between the decisions of this tribunal.

The decision in the E. C. Knight case is the subject of wider misapprehension perhaps than any other that this Court has ever rendered. By some it is said to have been a substantial nullification, and by others a severe limitation of, the Sherman Law. Later decisions are said by one Circuit Court of Appeals to have overruled it and by another to have affirmed it. Yet no decision has ever proceeded on clearer reasoning to a sounder conclusion.

In that case, this Court simply recognizes the distinction between production of commodities and exchange of commodities, which its critics appear to have overlooked or never to have understood. Adopting the same classification of industry as Sir Robert Sawyer, Attorney-General in the great monopolies case, but employing much clearer terminology—it held that production of commodities was entirely within control of the State. Exchange of its industrial products, within the limits of its own territory, was also held to be within the exclusive authority of each State. When, how-

ever, these products became subjects of exchange, among different States, or with foreign countries, then and not till then they passed under jurisdiction of the Federal government.

THE EXERCISE OF THAT JURISDICTION IS EMBODIED IN THIS SHERMAN LAW, WHICH AIMS TO PREVENT ANY COMBINATION OR CONSPIRACY THAT BY RESTRAINING INTERSTATE OR FOREIGN COMMERCE MUST NECESSARILY OPERATE TO DISCOURAGE AND, THEREFORE, TO DECREASE PRODUCTION.

This purpose which Congress must have had in view when it enacted the Anti-Trust Law—the only purpose within its competence—is enforced by all the decisions of this Court on the subject. Whenever a contract or agreement has been condemned by this tribunal as a violation of this law, it will be found that its effect must have been to discourage production, if it had been permitted to stand. Wherever one has been upheld it will be found that its operation could not have discouraged production by restraining interstate or foreign trade.

Even in the E. C. Knight case, although the Court declined to take jurisdiction because the transaction involved affected production within a State,—not the exchange of products among States or with foreign countries,—still the preliminary statement by the learned Chief Justice shows that the court below had considered the effect on production, and had held specifically that the purchase of certain sugar refineries in Philadelphia by the American Sugar Company had not decreased but had actually increased the production of sugar.

In the case of Anderson *v.* United States, this Court refused to consider whether an organization known as the Traders' Live Stock Exchange was or

was not engaged in interstate commerce, because in the language of Mr. Justice Peckham,

> "A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence."
>
> Anderson *v.* United States, 171 U. S., p. 614.

On the other hand, in the Addyston Pipe & Steel Co. *v.* U. S., 175 U. S., p. 235; in the case of W. W. Montague & Co. *v.* Lowry, 193 U. S., p. 39, and in the Swift case, 196 U. S., p. 375, where contracts or combinations were condemned for violating the Sherman Law the effect on trade in each instance was shown to be either actually or potentially restrictive.

In the light of these decisions, it is perfectly clear that the effect of a combination on trade, and therefore on production—not its effect on competition—was the test by which this court has always determined whether it violated or respected the provisions of the Sherman Law.

It is true that in nearly every instance where a contract, combination, association or organization has been attacked as a violation of the Sherman Law, its effect on competition has been closely examined by this Court. And this for a very good reason.

Competition is usually the means by which exchange is facilitated, and therefore, it is usually the agency by which production is stimulated. A combination to limit competition, usually operates to diminish production by embarrassing exchange,

and therefore the person or corporation responsible for such limitation usually violates this law, not because *competition* itself is restricted, but because through such restriction *production* or *exchange*, that is to say, *trade*, is restricted.

If, however, in some particular case, a restraint of competition in some form or degree operates naturally and inevitably to promote trade, the law will not condemn it and cannot condemn it without degrading government from a force that encourages and promotes the growth of improvement in human conditions into an obstacle that must check and arrest progress among human beings.

Judge Lacombe illustrates his view of the law by saying if "*two individuals who having been driving rival express wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line,*" they are diminishing competition and, therefore, violating this law—adding that it would make little difference whether the combination were effected by organizing a corporation or forming a partnership (Record, Vol. 1, p. 292).

It is respectfully submitted that such a combination as this learned judge assumes would not necessarily offend against the Sherman Law. It might or might not be a violation of the Act, depending on whether the necessary result of the combination was to increase or diminish trade between those two localities.

If by that combination it was intended to reduce the number of express wagons, that is to say, the facilities available for transportation, and then by exacting higher rates for this narrower service, obtain from the use of a single vehicle profits equal, or nearly equal, to those which formerly had been earned by both, that would necessarily tend to diminish the volume of goods transported. It would, therefore, be a restraint upon commerce

between the states, and it would undoubtedly fall within the prohibition of this Act.

But it might be that the object and necessary result of such a combination would be not to restrict but to improve transportation between these two villages, and in that case it could not be a violation of the statute.

If, instead of two competing wagons starting at the same hour from the same place to follow the same route, it was intended that thereafter, there should be two services each day, one in the morning and one in the afternoon, and by that change an improvement in transportation were effected, resulting in a more extensive exchange of commodities between these two villages, then that combination would have operated directly not to restrain but to expand trade, and it would not fall under the prohibition of this statute.

If, as the result of this combination, trade between these villages increased in volume so that instead of two vehicles there were four or six express wagons profitably employed in transporting goods, a law that would condemn it or prevent it could hardly be considered consistent with the existence,—certainly not with the progress—of civilized society.

The case assumed by Judge Lacombe serves to show also that the number of persons engaged in any branch of trade cannot be diminished by any combination, arrangement or system, which operates to increase the volume of production. If, however, the object and effect of a combination be to reduce trade and increase prices, then it must result in reducing the number of persons engaged in that particular industry.

If this combination of express routes resulted merely in reducing the number of wagons from two to one, commerce would not only be restricted as we have seen, but the number of persons employed

in it would be reduced certainly from two drivers to one, and probably from two managers to one.

But if the consolidation resulted in greatly increasing the volume of business, so that six or eight wagons were employed instead of two, the number of drivers would be increased to six or eight, even though the number of managers might be reduced to one. Moreover, this increased volume of transportation could be maintained only by expanding the volume of production—that is to say, widening the field of employment—in many different fields of industry. The net result must be that the total number of persons directly engaged in this particular occupation would be greatly increased, while the number employed in other industries would be indirectly but considerably stimulated.

If such a combination resulted in expanding commerce so widely that the necessities of transportation required a service of motor wagons and one was established which dispatched a car every half hour or every fifteen minutes from each village (grown now under the stimulus of such increased trade into thriving cities), under the construction of this statute adopted by the Circuit Court of Appeals, the operation of all these effective vehicles must be prohibited. And this even though such prohibition must result in reducing the largely increased trade thus created to its former narrow volume, because this salutary expansion of commerce had sprung from a combination which at its inception reduced the number of "independent dealers"—that is to say, the number of managers of express lines—by one, although in its progress it must have multiplied opportunities of employment to many.

The conditions governing this hypothetical express route are the conditions governing trade in all its branches. Trade cannot be increased with-

out increasing the number of human hands engaged in producing commodities and in exchanging them.

The vast increase in the tobacco trade since the formation of The American Tobacco Company must necessarily have increased enormously the number of persons employed in the production of tobacco, and in disposing of its manufactured products. A few managers or corporate officers who were no longer efficient may have been reduced to idleness, or they may have found it necessary to seek other employment for which they were better fitted, but countless additional hands must have found effective occupation in all the different departments of its business.

To enjoin as a conspiracy or combination in restraint of trade, this great industrial organization with its steadily expanding volume of business, because at its inception or during its development some smaller concerns were absorbed by it,—although these different absorptions of other companies were attended by an increase in the volume of the product and greater activity in exchanging it,—would be to place law and progress in such hopeless and irreconcilable antagonism that the function of government would not be protection, and, therefore encouragement, but oppression, and therefore restriction of industry.

For such an exercise of power by any department of government—which, it is respectfully submitted, would be little short of anarchical—there is no warrant or justification in the terms of the Sherman Law itself, nor in any decision of this court.

As we have seen, the Sherman Law embodies nothing new or drastic. Its main object is to extend over the whole field of federal authority prohibitions against restraint of trade older than

the English common law—old as civilization itself. It is true that in deciding the Trans-Missouri and Joint Traffic Association cases this court, by a majority of one, held that the Sherman Law embraced two features which might be considered novel.

Besides holding that it forbade every contract in restraint of trade, whether reasonable or unreasonable, Mr. Justice Peckham, speaking for the court, also held it condemns every agreement that potentially might restrain trade even though its immediate effect were to extend trade.

How far the language of Mr. Justice Brewer in the Northern Securities case (*supra*) may operate to deprive the Trans-Missouri case and the Joint Traffic Association case of weight as authoritative interpretations of the law in these respects it is not necessary to discuss here.

For the purpose of this argument it will be conceded that reasonable as well as unreasonable restraints of trade are prohibited by the statute.

Indeed, it is respectfully suggested that the distinction between reasonable and unreasonable restraints of trade is verbal rather than substantial. No restraint of trade which is actual, that is to say, if it actually restrict the *total volume* of trade, can be considered reasonable, and none such has ever been upheld by the courts.

"*Those minor contracts in partial restraint of trade,*" which Mr. Justice Brewer well says in the Northern Securities case, "*the long course of decisions at common law had affirmed were reasonable and ought to be upheld*" were in every instance it is ventured to say arrangements or agreements which while restraining some particular form of industrial activity, yet on the whole tended to encourage, and therefore, to increase the total volume of production.

Any contract by which a man bound himself not to engage in trade was at one time condemned by

the courts as against public policy. That rule was subsequently relaxed so that a man who had established a successful trade or industry was allowed, when he disposed of it, to covenant as a condition of the sale that he would not within a given period attempt to start a similar enterprise in the same locality.

This modification of the earlier and stricter rule was entirely due to the well grounded belief that by allowing a man to make such a contract, the value of the enterprise or business he had to sell was enhanced, and by permitting him to reap this larger reward of success, many more men were encouraged to establish or try to establish other successful enterprises. The various forces thus stimulated to additional activity resulted in a larger growth of trade than could have been caused by the efforts of one man, however energetic or capable he might be.

In other words, the only contract in restraint of trade which the courts sanctioned is one which, while it may have operated to restrict the industrial activity of one man to a certain extent, yet at the same time operated to encourage the activities of many other men in various directions, so that the total volume of industrial activity was increased, not restricted.

In the course of his opinion deciding the great Monopolies case Jeffreys, Lord Chief Justice, pointed out that while monopolistic restraints of trade were hostile to every government whatever its form, yet beginning with the case of Joseph while he was Viceroy of Egypt, and citing several instances under the Roman law, he showed that in every age exceptional conditions arose when temporary or local restraints of trade were sanctioned because they were found to be the only means of avoiding still greater impediments or restrictions to commerce.

As Mr. Justice Maule puts it in the case of Ranni *v.* Irvine, 7 Man. & G., 977, quoted by Mr. Justice White, speaking for the minority of this court in the Trans-Missouri case, the exception to the rule condemning contracts in restraint of trade is *in furtherance of the rule itself.*

Or if we may express the same idea in other terms, TRADE WOULD BE MORE RESTRICTED BY ABOLISHING THE EXCEPTION THAN BY MAINTAINING IT.

And see the opinion of Andrews, J., in Diamond Match Co. v. *Roeber, 106 N. Y., 473.*

Attributing then to the words of this statute the very broadest significance,—conceding that it prohibits all restraints,—reasonable as well as unreasonable,—of trade, it is most respectfully submitted that in no way and in no degree could this organization which has increased trade so extensively have operated to restrain trade or commerce.

Granting that a combination, association or organization, even though it has actually expanded trade, would fall within the condemnation of the statute if it possessed power to restrain trade—which might at some time be exercised—it is respectfully submitted that according to all the evidence in this case, the defendant by the essential conditions of its business is driven to seek all its profits in extending trade, and therefore, by the very nature of things it is impossible that it could ever be found attempting to restrain trade.

If it had power to restrain trade and exercised it, the inevitable effect of such restraint must be to injure itself.

In construing all laws, including this Sherman Law, the ordinary motives governing the conduct of human beings will be considered by the courts. The only conceivable motive for which men could plan unlawful combinations is to reap pecuniary

gain, and in this case it is manifest that restraint of trade could never be a source of gain, but must always be a source of loss,—possibly of ruin.

This court surely will not assume—without a scintilla of evidence—that the defendant from sheer innate depravity would deliberately inflict serious—possibly fatal—injury on itself, merely to perpetrate a much slighter injury upon consumers of tobacco.

All the evidence shows that under no conditions could this defendant profit by restraining trade in any direction. It has but one avenue of profit and that is expansion of trade.

Acquisition of competing concerns by a large corporation is frequently—perhaps usually—for the purpose of raising prices to consumers. To increase prices is always to diminish demand,—that is to say consumption—and therefore, to restrict production.

Such absorptions are, therefore, always and very properly objects of suspicion to the courts.

In this case, however, although the purpose for which other companies were acquired was undoubtedly to gain profits, yet owing to inherent conditions of the tobacco trade these profits could be increased only by expanding the volume of production. To have increased prices under any conditions, all the evidence shows would have injured trade and thus reduced profits. Without attributing any moral superiority to the defendant or its officers, it is most respectfully insisted that in acquiring other companies, its sole purpose must have been to increase the output of tobacco, for by that means alone could its revenues be increased.

It should be pointed out here that the competition which the courts below found to have been extinguished through absorption of various companies, by the defendant, The American Tobacco Company, was not the ordinary competition be-

tween persons producing the same commodity. Competition between producers of shoes, or cloth, or sugar, or tea, implies that several persons having a certain commodity to sell are contending with each other to secure a market by offering each one his product on the terms most likely to attract purchasers, that is to say, each is striving to make his product the cheapest and the best. The usual effect of such competition is manifestly to improve the quality and lessen the prices of commodities.

But the tobacco trade is conducted on a footing totally different and entirely peculiar.

Tobacco, when it is offered for sale, that is to say, when it goes into consumption, consists of two elements; the tobacco itself, and some process through which it has passed or is supposed to have passed. This finished article is known and distinguished by a brand which indicates that the particular product to which it is attached differs from all others in having passed through a peculiar process of preparation. It is by some such brand that practically every article in the trade is known and distinguished.

No consumer asks for smoking tobacco as such. He asks for Duke's Mixture or Blackwell's Durham, or some other brand. No one asks for chewing tobacco, as such, but for Battle Axe, or for Seal of North Carolina, or some other brand. No one asks for cigarettes, but for Sweet Caporal, or for Richmond Short Cut, or some other brand. And as a general rule a person who asks for one brand of tobacco will not accept any other. There never have been—neither before the establishment of The American Tobacco Company nor since—two or more companies or persons selling Richmond Short Cut, or Sweet Caporal, or Battle Axe, or Seal of North Carolina, or Blackwell's Durham, or Duke's Mixture, or any other brand. Each brand was the exclusive property of one firm or

corporation and therefore there never was competition between two concerns dealing in the same article of tobacco. Rivalry between dealers arose over efforts to sell, not the same wares, but different articles, which, though all consisting of tobacco, had undergone, or were believed to have undergone, each one a different process of preparation. This was not competition as it occurs between persons dealing in the same commodity, as, for instance, between different dealers in tea, but rather such a rivalry as exists between a dealer in tea and a dealer in coffee, or between dealers in port wine and sherry wine.

If rivalry of that description can be called competition, then competition between the various companies controlled by the defendant has not been ended or lessened. As matter of fact it is keener than ever, much keener than before The American Tobacco Company was organized.

When a company was absorbed by The American Tobacco Company, the thing of value acquired was the brand. By the very nature of the business, as appears from Duke's testimony and the testimony of all the witnesses, the suppression of one brand could not under any conceivable circumstances increase the sale of any other brand. Failure to supply a consumer with the brand he desired was very likely to result in his ceasing the use of tobacco altogether. And this potential cessation of consumption is a danger of loss against which the company is always forced to take vigilant measures of precaution. The only way by which acquisition of a brand could be made a source of profit was, as Duke has testified, by increasing the sale of the article represented by that particular brand.

Rec., Vol. 4, p. 376.

It is a peculiarity of this trade, as also appears from the testimony of Duke and of all the wit-

nesses, that it is impossible to create a larger demand for one brand of tobacco by pushing or advertising it, without creating a wider demand for other brands.

Id., p. 397.

To meet this peculiar feature of the trade, many different and wholly independent organizations are maintained by The American Tobacco Company for the very purpose of stimulating general consumption by conducting active and aggressive competition between different brands of tobacco. Of this competition and its keenness, evidences are abundant on every side. No traveller by railway or steamboat or automobile through any part of the country can contemplate the landscape without observing on some of its most conspicuous features, placards extolling the fragrance of Duke's Mixture or the robust excellence of Bull Durham smoking tobacco, both of them owned and controlled by The American Tobacco Company.

The fact that the profits from these competing companies go into the treasury of The American Tobacco Company does not make the rivalry or competition between them any less keen.

Even, therefore, if the Sherman Law be held to embody a prohibition against *restraining competition*, the defendant which depends so largely on competition for growth of its profits that it is forced to establish and maintain competing concerns at its own expense, when competition from other dealers shows signs of relaxation, cannot be held a combination or conspiracy in restraint of competition.

THE THING WHICH THIS STATUTE SEEKS TO PREVENT IS A TENDENCY VERY

GENERAL AMONG MEN IN ALL AGES TO SEEK EXAGGERATED PROFITS BY DIMINISHING PRODUCTION OF SOME COMMODITY THE SUPPLY OF WHICH THEY CONTROL WHOLLY OR IN A LARGE DEGREE, AND THEN EXTORTING HIGH PRICES FOR THIS ARTIFICIALLY RESTRICTED PRODUCT FROM THE NECESSITIES OF THE COMMUNITY.

Profits made by restraining trade, that is, by promoting scarcity, are abhorrent to the law of every country. This act seeks to prohibit every man from seeking profits by preying on his neighbors through raising artificially the prices they must pay for commodities. On the other hand, where a man seeks profit by increasing the total volume of production, either through his own labor or through directing the labor of others, he is attempting to serve the community. For he must swell the tide of abundance as he improves his own condition. Pursuit of profit in this manner the law of every civilized country encourages by protecting every man in the enjoyment of all that he can produce by his industry.

As we have seen, it is precisely this line—expansion of production—which the defendant from the very character of its business and the necessities of its existence is compelled always to follow in its pursuit of profits. Duke says:

> "The increase in the tobacco business in this country is enormous, and can be made still greater if proper efforts are put forward by the manufacturers. * * * We want the competitors to go on. I think we make more money than if we had a monopoly of the business. I know it is the case of the cigarette business, because when we had so

nearly all of it it was cut in half in four or five years, and as soon as we had competitors we built it up again."

"THERE ARE PLENTY OF PEOPLE NOW IN AMERICA THAT DON'T CONSUME TOBACCO. IF THERE IS ENOUGH WORK PUT BACK OF THEM, WE WILL MAKE THEM ALL CONSUME IT."

(Record, Vol. 4, p. 404.)

There is not a shadow of doubt cast upon this statement by anything that appears in this record. On the contrary, it is confirmed by all the evidence and by the decisions of the judges.

It is respectfully submitted that a corporation, which by the very nature of its organization must depend for profits on increasing the volume of industrial production, and which during the space of nineteen years has in fact actually increased it enormously,—extending commerce, not merely among the states, but between this country and all the world,—is not and by the very nature of things cannot be a conspiracy, contract, or combination in restraint of trade, which the law forbids or which this court should condemn.

SECOND POINT.

It being conceded that the defendant does not possess, exercise or enjoy any exclusive privilege or advantage in the tobacco trade except such as depend upon its own efficiency in production and in disposing of its manufactured products, the fact that the amount of its product is a very large proportion of all the tobacco consumed in this country does not make it a monopoly or an attempt to monopolize an article of commerce, such as is forbidden by the second section of the Sherman Law.

On this head Judge Lacombe says (and the other judges do not differ from him), *"during the existence of the American Tobacco Company new enterprises have been started—some with small capital in competition with it and have thriven."*

Of course there may have been other competitors who have failed, but if this be so, the only reasonable inference is that those with a certain measure of skill are able to hold the field against the defendant while others will be driven from it.

It is respectfully submitted that predominance, however extensive, in the manufacture or sale of any commodity established and maintained solely by superior skill in producing it and disposing of it, has never yet been condemned as a monopoly by the courts of this or any other country.

Although the Circuit Court of Appeals failed to hold the defendant guilty of monopolizing or at-

tempting to monopolize an article of commerce, yet the opinion of Judge Noyes seems to indicate that because the defendants control a large proportion of the tobacco output, therefore it is a monopoly within the meaning of the law.

This, it is respectfully submitted, entirely misconceives the purport of the word monopoly as it occurs in the statute.

This word, of late years, has been used so improvidently that its significance has become somewhat vague and uncertain even in some judicial utterances.

In the case of United States *v.* E. C. Knight, *supra,* the luminous opinion of the learned Chief Justice shows that the members of this Court are familiar with the conditions in which this term originated as well as with the legislative and judicial attempts to deal with it, which form an important and interesting feature of English jurisprudence.

It is quite true that in the Sherman statute this word is intended to meet conditions different from those which in former times were associated with monopoly.

What these conditions are Mr. Justice McKenna suggests very clearly in the case of National Cotton Oil Co. *v.* Texas, 197 U. S., page 129. He says in effect, and with perfect truth, that the word as used in recent statutes no longer applies merely to monopoly based on privileges such as were granted by patent of the Sovereign in former days, but it is intended now to describe kindred abuses perpetrated by other and newer methods.

While Lord Coke's definition of monopoly quoted by the learned Chief Justice in the Knight case does not any longer describe the exact means by which monopoly is established—the essential char-

acter of monopoly remains unchanged—and indeed unchangeable.

The essence of monopoly is now, as it has always been, pre-eminence established not by excellence in production, but by other means, and all other means are essentially vicious, demoralizing and corrupt, whether they take the form of exclusive grants by a sovereign,—partial, that is to say unjust laws,—secret rebates granted by railroads—or any other device intended to prevent the most capable man from exercising in the fullest degree all his industrial skill.

The industrial predominance acquired by superiority of skill and diligence in exercising it, which all civilized nations protect, and by protecting encourage, it is the object of this second section of the Sherman Act to prevent any man establishing or maintaining by trick, combination, conspiracy or crime.

Where domination of the market is obtained by the seller of a commodity through the aid of any trick, device, combination, agreement or conspiracy, which aims to prevent any competitor from entering the same field of industry and measuring his skill with all others on perfectly equal terms, such domination is an attempt to monopolize an article of commerce within the meaning of this Act. In other words, the hateful conditions which a Sovereign's patent formerly created but which no Government in this age would tolerate, shall not be re-established in this country by private individuals who control enormous resources through contract, combination or conspiracy between themselves, to favor some producers and discriminate against others in the use of facilities which all should enjoy on equal terms.

But while predominance in the market resting in any form or degree on advantages secured through secret rebate, plot, combination or con-

spiracy in any form, is forbidden by law and should be enjoined by the courts, predominance resting solely on excellence, even though it be practically complete control of the market, is sanctioned by law and should be protected by the Courts.

The only way, as we have seen, by which men can possibly profit through monopoly, and therefore the object for which they will seek to establish it is to secure large profits by extorting high prices for a commodity production or exchange of which the monopoly artificially restricts. The excess of such prices over the normal are manifestly a tribute exacted from the necessities of the community. Monopoly in this sense—the only sense in which it can be properly used—is always oppression of the public. Laws aimed against it are wholesome attempts to check or prevent gross abuses.

On the other hand, predominance, however extensive, though it amounts to entire control of the commodity, so long as it rests solely on the excellence of the article produced, can injure no one, but must benefit everyone. Such predominance can be maintained only by offering the best commodity at the cheapest rate. Where there is no power to extort from consumers prices artificially inflated, profits can be increased only be increasing the volume of the product, which entails necessarily a wider demand for labor and a correspondingly extensive rise in the rate of wages, accompanied by a decrease in the cost of commodities. This can have no other result than to benefit every one—producer, consumer, employer and employé—the whole body of the community.

So far as the operations of the American Tobacco Company are disclosed by the record, there is no evidence that it has raised prices. On the contrary, it appears abundantly that

while the quality of tobacco has been steadily improved and the output steadily increased, since its organization, prices have remained stationary, although during that time prices of all other commodities have risen ~~accordingly~~ normally—in many instances over one hundred per cent. But to prevent any advance of prices in a period of universally rising markets is equivalent to reducing prices under normal conditions. The essence, object and explanation of monopoly being large profits obtained through extorting high prices for a restricted product, this defendant, which has increased production, expanded trade and lowered prices, is the exact opposite of a monopoly.

It is suggested by Judge Noyes that the predominance of this company as a purchaser or consumer of raw or leaf tobacco is so great that the farmer who produces it is at its mercy. This might be true if the defendant enjoyed any privilege by which competitors could be prevented from taking immediate advantage of failure on its part to meet every demand of consumers. Under existing conditions, however, possession of leaf tobbaco is more necessary to the defendant than sale of it can possibly be to the farmer. A farmer can wait for the marketing of his crop without any serious injury to its value, but interruption, however brief, in the supply of raw material would result in injury to the defendant that would certainly be serious and probably irreparable. Failure even for one day to furnish all that consumers of tobacco require would suffice to extinguish the superiority by which rivals are now kept from the field and a hundred concerns springing into successful competition would be the immediate consequence. Competition may be potential or active. Under the conditions established in this case there is always potential competition for the tobacco company.

To hold that predominance resting on excellence must not be allowed to pass a certain point or degree would not be to encourage or maintain competition but to discourage and prevent it.

The object of competition in every pursuit is an attempt to dominate it; to win predominance in it.

It is not possible to have competition without competitors, and if there be competitors, one must prevail. Where a number of persons engaged in the manufacture of shoes, or cloth, or machinery, compete in a perfectly open field, one is very likely to succeed in producing his commodity cheaper than the others. If he offers it to the public at a lower price, he will always be the first to dispose of his product. While he can supply the demand no one will pay a higher price for the same article to another producer. He would, therefore, have a monopoly in the sense that this word is used by Judge Noyes. He who sells cheapest must always dominate the market, for in economics the domination of the cheapest is the survival of the fittest. If the man who prevails in competition is not allowed to enjoy the fruit of his victory, that is to say, domination of the market, he will not compete any further; nobody else will; and then there will be no competition whatever.

The competition of men in any department of human endeavor, if it be absolutely free, always develops excellence. This manifestly is to the interest of the community. And the pre-eminence established by excellence must be maintained by excellence. Where merit is suffered to decline the dominance resting on it will disappear. As the producer of the best commodity will eventually dominate the market for his product, so will the possessor of conspicuous excellence dominate any other field of endeavor. At the bar the most capable lawyer obtains the best clients. In medicine the most skillful physician obtains the most desirable

patients; in literature the best writer obtains the widest circulation; each dominates his calling and in that sense he would be a monopoly under the doctrine of Judge Noyes.

If predominance—however decisive—resting on excellence be reprehensible, how can it be prevented? There is but one way. The distance between excellence and mediocrity can be obliterated only by reducing the superior to the level of the inferior. The process cannot be reversed. It is impossible, by any device of legislation, to make the unskillful equal to the skillful man, but it is entirely possible for government to limit the efficiency of the skillful by hampering his industry.

If we are to suppress pre-eminence resting on excellence, we must begin by suppressing the excellence which establishes it, and this would be to arrest all human improvement.

But by what practical measures could this excellence be suppressed? Must I be denied the right to obtain a good suit of clothes for thirty dollars from a large concern, and forced to pay forty dollars for an inferior suit to some less efficient clothier, lest he might be driven from business if I be suffered to obtain the larger return for my money,—that is to say, for my labor,—or for the things produced by my labor? This court has held in the case of Loewe *v.* Lawlor and intimated in the Debs case that the prohibitions of the Sherman law apply to individuals as well as to commodities produced by their labor. Must the most efficient in every other field of labor be restrained from exercising their full capacity lest the inefficient in that particular calling be driven from it and compelled to find a livelihood in some occupation for which they are better fitted? Must the best lawyer lose a few cases through design—that is to say, betray some clients—lest the fame of his successes

deprive some rival or competitor of clients sufficient to support him?

Must the most skillful doctor suffer a few patients to die—that is murder a few of his fellow creatures deliberately—lest his success in curing disease might lift him beyond the competition of rivals, who kill patients through ignorance?

There is no other way by which capacity and incapacity can be placed on a level so that one will not excel the other.

The rapid growth of population in this country, and indeed throughout the world — at once the phenomenon and the problem of this generation—enormous though it has been, has not as yet outstripped the means of sustenance available for their support. This encourages the reassuring belief that civilized society possesses resources capable of ~~developing resources~~ producing commodities equal to all the demands that may be made upon it. But no one can doubt that the fullest and freest exercise of all human capacity in production is absolutely essential to the maintenance of this abundance.

To hold that the defendant must be enjoined from holding the predominance which is the fruit of its industrial efficiency, is to hold that the American citizen may not develop his industrial skill and effectiveness to the highest point of which he is capable. This would be to hold that the government of the United States, instead of being an agency to encourage the widest production of commodities, is a force to prevent the supply of commodities from becoming abundant beyond a certain degree.

The essential difference between government that is beneficent and government that is oppressive has always been that one promotes prosperity

by encouraging the industrial energies which produce abundance of commodities, while the other by discouraging production—through direct restraints of commerce or imposition of onerous taxes on its earnings—induces scarcity.

This government, established to promote the general welfare by consistent loyalty to that lofty purpose during all the years of its existence, has always been the most secure and of recent years it has become the richest and most powerful in the world.

In the varied experiences of men it has happened more than once in other countries that government for the purpose of enriching its chiefs or its favorites has tolerated, sanctioned and even imposed restraints on trade—but never without imperilling or ending its own existence.

Michelet, in a note to Chapter 13 of his book Richelieu et la Fronde, which is Volume 14 of his Histoire de France, says it was by successive famines, superinduced by such interferences with industry that the great revolution of 1789 was brought about.

By the "pacte de famine"—the most infamous scandal of an infamous reign, which was but a combination among the great officers of state, headed by the King, to restrain trade in grain, for their own profit—to corner the wheat market as it would be called to-day—Guizot says, the French monarchy was digging with its own hands the grave in which it was soon to be buried.

And Henri Martin points out that this "pacte de famine" was the bloody spectre invoked so many times as the demon of vengeance during the darkest days of the revolution (Hist. de France, Tome 16, p. 292). "At the bottom of the worst excesses of the revolution," he says, "if they are closely examined, one can see the spectre, wan and emaciated,

(*have et decharné*) of the 'pacte de famine'" (*id.* 298).

The whole course of history shows that no government which undertook deliberately to restrain production has long survived.

Shall this government now become a force to restrict production and induce scarcity such as has often afflicted human beings in the past or shall it remain a force to encourage production and promote abundance as it has blessed this country and encouraged all other countries for more than a century?

That is the question which this tribunal must now determine in deciding whether this defendant, for no other reason than because it has shown itself the most effective agency ever organized to augment the supply of a certain commodity, shall be condemned as a law-breaker and enjoined from further exercise of its industrial efficiency.

From limiting abundance in this country by enjoining the most efficient producers of commodities, it may seem a long way to those other restraints of trade which produced famine in France one hundred and fifty years ago. But it is the first step that is the most difficult in any direction. Hitherto, all the steps of this government have been upward. It is most earnestly hoped that if the day should ever come when its course must be reversed, the first step downward will not be taken under pressure of a decision by this Court.

It may well be that this defendant has committed individual acts of oppression, or made some combinations, or engaged in certain conspiracies with a view to driving some particular competitors from the field, or preventing rivals from entering it. If such offenses can be proved they can be enjoined, and the persons responsible for them should be promptly and adequately punished.

No transactions of this character, however, appear in the testimony. So far as the record shows, no company acquired by this defendant was driven to sell its business by any acts of oppression. On the contrary, the complaint itself in describing the acquisition of each company, states in every instance that it was obtained by paying for it a price "*greatly in excess of real values*" (Record, Vol. 1, pp. 22 *et seq.*).

The testimony of Duke, as has been already seen, shows that the thing acquired in each instance was a brand, and that the only way by which this brand could be made a source of profit was by multiplying sales of the article it represented.

The exhibits presented by the government show conclusively that the volume of trade in tobacco has been actually expanded to an enormous degree.

It appears therefore affirmatively and conclusively that no human being has been injured by the organization of this defendant. Every person affected by its operations has been benefited.

Persons who sold other companies to it have received for their property more than it was worth. Consumers have been afforded a better quality of tobacco at lower prices. The body politic has enjoyed wider demand for labor made necessary by increase in the output. The trade of the country has been expanded and thereby the revenues of government have been largely augmented.

Above all, it appears beyond question that the methods by which it has prospered are precisely those which monopoly abhors and avoids, or rather those which monopoly cannot meet and survive.

To adjudge it a law-breaker and a public enemy, would be to hold that serving the community in every way open to the activities of an industrial organization is not to be encouraged by protection of the law, but to be discouraged and ended by condemnation of the law.

Such a conclusion, it is respectfully submitted, would be restrictive of industry, inconsistent with the words of the statute, fraught with the gravest peril to the welfare of this country.

LAST.

It is respectfully submitted that the judgment of the Court below should be reversed.

W. Bourke Cockran,
31 Nassau Street,
New York City.

Supreme Court of the United States.

UNITED STATES OF AMERICA, Appellant, AGAINST AMERICAN TOBACCO COMPANY *et al.*, Appellees.	*No. 316.*
AMERICAN TOBACCO COMPANY *et al.*, Appellants, AGAINST UNITED STATES OF AMERICA, Appellee.	*No. 317.*

Petition of Thomas Thacher and J. Parker Kirlin for Leave to File a Brief.

To the SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

That they are counsel for the defendants in the suit of Thomsen *vs.* Union Castle Steamship Company, Limited, now pending in the Circuit Court of Appeals for the Second Circuit;

That the first trial of that suit resulted in a dismissal of the complaint by Judge Hough (149 Fed. Rep., 933);

That on plaintiff's appeal the judgment was reversed by the Circuit Court of Appeals for the Second Circuit (166 Fed. Rep., 251), that Court basing its decision upon the proposition that any combination which eliminates or limits competition is a combination in restraint of trade or commerce under the Anti-Trust Act of July 2nd, 1890, the same proposition which we understand to be the basis of decision in this case in the Circuit Court;

That a re-trial of the Thomsen case has been had, resulting in a judgment against some of the defendants, based upon the same view of the law, and that an appeal from said judgment is now pending in said Circuit Court of Appeals.

That inasmuch as this case brings up the same fundamental question as is involved in the Thomsen case, and a determination of that question herein will, in effect, be a determination thereof for the purposes of the Thomsen case, your petitioners desire, and deem it proper, to ask, that they be permitted to file herein a brief, which is tendered herewith, limited to this question which is common to the two cases.

And your petitioners accordingly pray for leave to file such brief herein.

Respectfully submitted,

THOMAS THACHER,
J. PARKER KIRLIN.

Supreme Court of the United States.

UNITED STATES OF AMERICA, Appellant, AGAINST AMERICAN TOBACCO COMPANY *et al.*, Appellees.	No. 316.
AMERICAN TOBACCO COMPANY *et al.*, Appellant, AGAINST UNITED STATES OF AMERICA, Appellee.	No. 317.

Brief on question common to this case and Thomsen v. Union Castle S. S. Co., filed by leave of the Court by counsel for defendants in the latter case.

This brief is confined to a single purpose—to combat the proposition which we understand to be the basis of decision in this case, and in Thom-

sen *v.* Union Castle S. S. Company, 166 Fed. R., 251, and in Penn. Sugar R. Co. *v.* American Sugar R. Co., 166 Fed. R., 254.

In this case Judge Lacombe says:

> "The act as above construed prohibits every contract or combination in restraint of *competition.*" And in the next sentence but one he says:
>
> "Accepting this construction of the statute, *as it would seem this court must accept it,* there can be little doubt that it has been violated in this case."

In the Thomsen case, Judge Noyes says:

> "This combination being in restraint of *competition* in foreign commerce, was in contravention of the Federal Anti-Trust Statute."

And in the American Sugar Company case he says:

> "An agreement or combination for the elimination of competition, from an economic point of view, may not operate in restraint of trade. *It may actually develop and increase trade.* Such an agreement, however, *from a legal viewpoint, is necessarily in restraint of trade.*"

It seems, therefore, beyond doubt that the three Circuit Judges who concurred in deciding this case understood that this Court had so construed the Anti-Trust Act as to compel them to hold, for the purposes of that act, that any contract or combination which in any way eliminates, restrains or limits competition is necessarily in restraint of trade or commerce.

It is respectfully submitted that this Court has not so construed the act, and that it cannot reasonably be so construed.

I.

This Court has not construed the act as prohibiting "every contract or combination in restraint of competition."

No cases in support of their understanding are cited by the Circuit Judges in the opinions in the three cases, except the Northern Securities case and National Cotton Oil Company *v.* Texas, 197 U. S., 115, and the latter case dealt only with a Texas statute, which in terms prohibited combinations in restraint of competition, and what little was said about the Federal Anti-Trust Act was merely *arguendo.*

In the Northern Securities case, among the propositions which Mr. Justice Harlan stated as deducible from the earlier decisions of this Court were these:

> (1) "That every combination or conspiracy which would extinguish competition *between otherwise competing railroads* engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the Act;
>
> (2) "That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce."

Of these two propositions the first is expressly confined to railroads. The second is impliedly so confined, because of the connection in which it comes and the fact that the case related to railroads; and this is confirmed by its origin, the language used being taken from the Joint Traffic Association case.

Mr. Justice Harlan gives a list of the cases from which his several propositions are deduced.

The E. C. Knight Company case, the Hopkins case and the Anderson case (in each of which there was found no violation of the Act) give no support to the two propositions above quoted.

In the Addyston Pipe & Steel Co. case the Court disposed of the objection that the contract or combination was formed only to protect the parties in securing prices reasonable to themselves and the public, simply by denying the fact, saying:

> "The facts thus set forth show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable, and therefore the first objection above set forth need not be further noticed."

Montague *v.* Lowry, it is submitted, contains nothing pertinent to the present inquiry. The agreement there in question was condemned because "it narrowed the market for the sale of tile in California from the manufacturers and dealers therein in other states, so that they could only be sold to members of the association, and it enhanced prices to the non-member."

These cases are very far from asserting that every contract or combination which eliminates or restrains competition, whatever its effect may be upon the development of trade or commerce, is a restraint of such trade or commerce for the purposes of the act.

The Trans-Missouri Association case and the Joint Traffic Association case were evidently the cases relied upon by Mr. Justice Harlan for the propositions above quoted, and attention may be confined to the later, in which alone the question now pertinent (as applied to the business of railroads) was fully argued and was definitely passed upon.

In the last three pages of the opinion in the Joint Traffic Association case the Court dealt substantially for the first time with the argument that such an agreement as was then before it (relating to railroads) was not in restraint of trade or commerce, although it concededly restrained competition. Mr. Justice Peckham states the question as follows:—

> "Whether stifling competition tends directly to restrain commerce *in the case of naturally competing railroads.*"

And the argument of counsel he states as follows:

> "They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree and on a single point. They admit that if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. Counsel then add (*and therein we entirely agree with them*) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale and in numerous forms without competition."

And then comes the following:

> "The material considerations, therefore, turn upon the effects of competition *upon the business of railroads*, whether they are *favorable to the commerce* in which the roads are engaged, or *unfavorable and in restraint of that commerce.*"

Is this last statement merely a continuation of the argument of counsel? Is it not rather the Court's statement as to the point upon which the question turns, intended to show how far the Court agrees with the counsel and where the point of difference is? The Court, as we read the opinion, as-

sents to counsel's major premise, that a restraint of competition is not necessarily a restraint of trade or commerce, and is such only when the restraint of competition is unfavorable to trade or commerce; and the rest of the opinion is directed against the contention (the minor premise) that the restraint of competition involved in this particular agreement was "favorable to the commerce in which the roads are engaged."

Assent to the major premise is a denial of the proposition that the act "prohibits every contract or combination in restraint of competition."

In discussing the minor premise, Mr. Justice Peckham says:

> "The natural, direct and immediate effect of competition is, however, to lower rates, and thereby to increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, *restrains* instead of *promoting* trade and commerce."

NOTE: This is the origin of Mr. Justice Harlan's second proposition above quoted.

Note the antithesis in the last words, "*restrains* instead of *promoting* trade or commerce." Whether in the last preceding quotation, Mr. Justice Peckham was stating the view of the Court or only that of counsel as to the point upon which the question turned, becomes unimportant when the force of these words is appreciated. They show that, in this respect, the views of counsel and of the Court were in accord. They show that the Court decided against the defendants, because it reached the conclusion that the agreement before it "*restrained* instead of *promoting* trade or commerce," or in other words that it was *unfavorable* to the commerce in which the roads were engaged. They show that the Court assented that the

crucial question as to the legality of the agreement was: Does it restrain or promote trade and commerce? or (the same question in substance), Is it favorable or unfavorable to trade and commerce? They show that the Court did not intend to dispute or question, but rather intended to assent to Mr. Carter's position, stated in the report of his argument as follows: "That it (the agreement) is in fact in restraint of trade or commerce must be shown before this action can be maintained."

Had the Court reached a contrary conclusion upon the crucial question above stated, could it, consistently with the view clearly shown by the opinion as it is, have decided against the defendants, holding substantially in the language of Judge Noyes in the American Sugar Company case, that though an agreement is favorable to trade and commerce, though it promotes, develops and increases trade and commerce, yet if it in any way eliminates or limits competition, it restrains trade and commerce; that though from an economical point of view it does not operate in restraint of trade, yet from a legal viewpoint, it does?

It is submitted that he who wrote, and those who concurred in, the opinion in the Joint Traffic Association case, could not hold such a view as that of Judge Noyes without a thorough change of mind. The Court has substantially said that what promotes or is favorable to trade and commerce, does not restrain it within the meaning of the act.

It is submitted that the proposition that restraint of competition is always restraint of trade or commerce was not decided in the Trans-Missouri Association case nor in the Joint Traffic Association case, except perhaps as to the business of railroads.

This review covers all the cases which, either directly or by reference to the Northern Securities

case, were given by the Circuit Judges as showing that the construction of the Act as stated in Judge Lacombe's opinion had been settled by this Court.

No other case is found which it is thought can reasonably be cited as in support of that theory. And it is respectfully submitted that this Court has nowhere up to this moment decided that "the Act prohibits every contract or combination in restraint of competition," or, in other words, that anything by which any competition is ended, suspended or limited necessarily restrains trade or commerce.

II.

The act cannot reasonably be construed as prohibiting "every contract or combination in restraint of competition."

Competition is not mentioned in the Act.

Restraint of competition may and often does restrain trade or commerce, but it does not always do so. If this Court is deemed to have decided that it always does in the case of "naturally competing railroads," it does not follow that it always does in other lines of trade and commerce. The fact that it does, must, we submit, be established in each case. The courts cannot make facts or, properly, adjudge facts without or contrary to evidence.

Take the two express carriers of Judge Lacombe's opinion. If instead of each running his ramshackle wagon with his worn-out horse, they combine their capital and energies and by so doing

give better facilities at reasonable rates, will trade or commerce, as matter of fact, be thus restrained; will it not rather be promoted? Is the formation of a partnership between two persons engaged in the same business a hindrance to progress in trade or commerce? Has the development of trade and commerce, which has been so phenomenal during the last half century, been accomplished *notwithstanding* or *because of* the use of corporate organization to combine the labor and resources of many to take the place of the separate efforts of single individuals? Have we been working blindly all these years? In choosing combination through partnerships and corporations as the leading method in our efforts to develop trade and commerce, have we chosen a method which must necessarily restrain trade or commerce? Should we now face about, and require that each man and each man's money shall work alone, to the end that trade and commerce may be free from restraint and so may expand, develop and increase?

The history of the act shows a clear intent on the part of Congress not to condemn contracts and combinations in restraint of competition generally.

The proposal to deal with restraints upon *competition* was rejected in putting the bill in its final shape. Such proposal had been before the Senate for many months. The Sherman Bill (S. 1 in the Fifty-First Congress) introduced by Senator Sherman on December 4, 1889 (substantially the same as S. 3445 introduced by him in the Fiftieth Congress on August 14, 1888), was directed primarily against "arrangements, contracts, agreements, trusts or combinations made with a view, or which tend, *to prevent full and free competition.*" (It was directed also against arrangements, etc., "to advance the cost to the consumer"). This bill was debated quite at length from February 27th to March 27th, 1890, as shown on pages 72 to 299 of

"Bills and Debates in Congress relating to Trusts," prepared by direction of the Attorney-General in 1903. On March 27th, 1890, it was referred to the Judiciary Committee, because of questions as to validity, as to meaning and as to policy. Restraint of competition was the one primary subject of the bill as it was on March 27th, 1890, but as redrawn by the Judiciary Committee, and as it became law, it made no mention of competition, but was directed, in its first section (the second relating to monopolizing) against contracts, combinations and conspiracies *in restraint of trade or commerce.* The Judiciary Committee, it is true, threw away all of the bill referred to it, except the enacting clause; but since restraint of competition was the primary object of attack in the bill as referred, so it was the conspicuous thing which the Committee rejected in redrawing it.

That the rejection of competition as the subject of enactment was intelligently intended and was not the result of inadvertence, is clear enough from the mere comparison of the bill in its two forms, before and after the Judiciary Committee dealt with it. But it becomes clearer still in the light of what immediately preceded the reference to that Committee. Once before a motion so to refer it had been made, but it had been voted down. On March 27, 1890, it was made again with success immediately upon the close of a forcible speech by Senator Platt, of Connecticut, to be found on pages 295-298 of said compilation of "Bills and Debates in Congress relating to Trusts," and presumably because of his criticism of the bill as it then was. Senator Platt, among other things, said:

> "In other words, this bill proceeds upon the false assumption that all competition is beneficent to the country and that every advance of price is an injury to the coun-

> try. That is the assumption upon which this bill proceeds. There never was a greater fallacy in the world. Competition, which this bill provides for as between any two persons, must be full and free. Unrestricted competition is brutal warfare, and injurious to the whole country. The great corporations of this country, the great monopolies of this country, are every one of them built upon the graves of weaker competitors that have been forced to death by remorseless competition. I am entirely sick of this idea that the lower the prices are the better for the country, and that any effort to advance prices, no matter how low they may be, and that any arrangement between persons engaged in business to advance prices, no matter how low they may be, is a wrong and ought to be repressed and punished."

The Senate had had before it for months a bill directed against arrangements, contracts, etc., in restraint of competition. Through its Judiciary Committee it redrew the bill leaving out all reference to competition and directing its prohibition against contracts, combinations and conspiracies in restraint of trade or commerce and against monopolizing; and this it did immediately after the suggestion of Senator Platt that in the interest of trade and commerce competition must sometimes be restrained, that a prohibition against contracts or combinations in restraint of competition would oftentimes operate to limit the growth of trade or commerce, to prevent its expansion and development. The title was changed so as to declare its purpose to be "to protect trade and commerce" and the prohibition was made to run, not against contracts or combinations in restraint of competition, but instead against contracts or combinations in restraint of trade or commerce. Clearly the proposal to condemn all contracts or combinations in restraint of competition was rejected by the Senate when it passed the bill on April 8, 1890.

The subsequent history of the bill is worth consideration in this connection. Efforts were made in the House to put back the prohibition against contracts affecting competition; but they failed. The bill finally became law in the form in which the Senate passed it on April 8th, 1890. What the Senate rejected was also rejected by the House. In the House, on the proposal of Mr. Bland, an amendment was made by adding,

> "Every contract or agreement entered into for the purpose of *preventing competition* in the sale or purchase of any commodity transported from one State or territory to be sold in another, or so contracted to be sold, or to prevent competition in the transportation of persons or property from one State or territory into another shall be deemed unlawful within the meaning of the Act * * *."

When the bill came back to the Senate, it concurred in the House Amendment, with an amendment making it read as follows:

> "Every contract or agreement entered into for the purpose of preventing competition in the transportation of persons or property from one State or territory into another, so that the rates of such transportation may be raised above what is just and reasonable, shall be deemed unlawful within the meaning of this Act."

Thereafter a conference was had which recommended the adoption of the amendment in form as last shown, with an addition of no importance for the present purpose.

The report of the House Conferees was accompanied by a statement of the majority of them as follows:

> "In the original bill, two things were declared illegal, namely, contracts in restraint

of interstate trade or commerce, and the monopolization of such trade.

Its only object was the control of trusts, so-called, so far as such combinations in their relation to interstate trade are within reach of Federal legislation.

The House amendment *extends the scope of the act to all agreements entered into for the purpose of preventing competition* either in the purchase or sale of commodities, or in the transportation of persons or property within the jurisdiction of Congress.

It declares illegal any agreement *for relief from the effects of competition* in the two industries of transportation and merchandising, however excessive or destructive such competition may be.

The amendment reported by the conferees is the Senate amendment with the added proviso that the powers of the States over the subjects embraced in the act shall not be impaired thereby.

It strikes from the House amendment the clause relating to contracts for the purchase of merchandise, and modifies the transportation clause by making unlawful agreements which raise rates above what is just and reasonable."

The conference report was rejected, the House receded from its amendment, and the bill was finally passed by the House in form as originally passed by the Senate.

The proposal to interfere with contracts and combinations affecting competition, as such, having been turned down in the Senate, was brought up again in the House, and was finally turned down there. If it is to be taken up again and made effective, can this be done by judicial action?

A contract or combination in restraint of competition might or might not restrain trade or commerce. Such a contract or combination was condemned, if at all, not because it restrained competition, but because it restrained trade or com-

merce. If any contract or combination should be challenged under the bill as passed, the question would be: Does it as matter of fact restrain trade or commerce? If this question were answered in the negative, the challenge must fail, regardless of the question: Does it in fact restrain competition?

That these two questions are not identical, Mr. Justice Peckham substantially agreed, speaking for the Court, in the Joint Traffic Association case. That they are not identical was clearly shown by Senator Platt in the speech referred to above. And is it not obvious to common sense? And yet they seem to have been treated as identical by the Circuit Judges in this case and the other cases mentioned above. Finding a contract or combination involving elimination or restriction of competition, they pass immediately to the conclusion that it is in restraint of trade or commerce, and illegal under the act. In the Sugar Company case, they even go so far as to say that a combination eliminating competition is in restraint of trade, even if trade is thereby developed and increased. Where in the language of the act, either read by itself or in the light of its history, can justification be found for holding that to be "in restraint of trade or commerce," whereby trade and commerce are not restrained, but are on the contrary developed and increased?

Turn again to the last words of the statement in the Joint Traffic case, which is the only ultimate support for the proposition that restraint of competition is restraint of trade or commerce, "*restrains* instead of *promoting* trade and commerce." *Promoting* and *restraining* are here used as opposites. Can that which *promotes* trade or commerce be held to be *in restraint* of trade or commerce?

Can there be any doubt that the intention of the act was as expressed in its title: To protect trade

and commerce? "To protect trade and commerce against unlawful restraints and monopolies"? It looked to the development and increase of trade and commerce in the interest of the public, to its growth and expansion and the removal of obstacles to such growth and expansion. It seems almost like trifling with a large purpose to treat the act as if it meant to make illegal every effort for the development of trade or commerce, however well calculated to the end in view, which involved any elimination of competition. Say that Congress had in mind and assented to the general proposition that competition is the life of trade. May they not at the same time have realized that in the interest of trade, competition must sometimes be eliminated? May they not have looked around and behind them and have seen that combination through partnerships, associations and corporations, necessarily involving elimination of competition among the members, had been and was and always would be essential to the creation of competition adequate for the full development of trade and commerce? That here and there competition might be eliminated was of no consequence; the purpose was to protect trade or commerce, and Congress prohibited only contracts and combinations by which trade or commerce would be restrained.

It is submitted that before any contract or combination can be condemned under the act, it must appear that thereby trade or commerce was in fact restrained. The fact may perhaps be found by presumption based on judicial knowledge; but in some way the fact must appear. If it be found that thereby trade or commerce was promoted, such finding is a denial that it was restrained. But if it is matter of uncertainty whether trade or commerce was thereby restrained or promoted, the burden of such uncertainty must turn the scale against the Government.

The record in this case shows a wonderful business development. It shows what combined capital and combined experience and talent can do in the promotion of trade and commerce. It shows that the benefits are not confined to those who bring it about. Such benefits are shared by the purchasers who sell to the company and the traders and consumers who buy its products. And yet it is charged that because the creation of the combination which the defendant company represents or embodies involved, as is claimed, elimination of competition by bringing persons together who had been competitors. the combination has restrained, and now restrains, trade and commerce. Can this Court sanction this charge without running off into the realms of fiction and ignoring what everybody knows and this record illustrates?

Mr. Bland, when he offered the House amendment, quoted on page 12, *ante,* speaking of the bill as it became law, said:

> "I was somewhat struck, Mr. Speaker, with the frankness of my friend from Texas (Mr. Culberson) in his explanation of this bill. If the country is advised up to this very time as to any particular kind of contract or agreement that is covered by the bill, the gentlemen who have reported it and who have advocated it upon this floor have not designated that particular contract."

The frankness of Mr. Culberson to which he referred was that shown by him when, reporting the bill from the Judiciary Committee of the House, he said:

> "Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or com-

> merce mentioned in the bill will not be known until the courts have construed and interpreted this provision."

And again,

> "I wish to be understood, Mr. Speaker, as having stated in the outset that I do not know, nor can any man know, just what contracts will be embraced by this section of the bill until the Courts determine."

Mr. Taft, speaking at Bath, Maine, in 1906, said:

> "It would seem as if Congress itself knew that the evil existed, but had a most indefinite idea of how it was to be described, and the matter was apparently turned over to the Courts as cases arose and decisions were invoked, to work out the exact character of the offences denounced."

Since Congress had no clear intention in passing this act and the courts are still engaged in "working out the character of the offences denounced," the position taken in this brief cannot fairly be attacked by a challenge to those who hold it to come out and tell what the act does mean. That still remains for the courts to do. We insist that it is clear that it has not the meaning given to it by the Circuit Court in this case. If this is clear, it matters not how much or how little of meaning may be left to it.

But will there not be left enough of meaning to reach the evil sought to be repressed, to fit the purpose of Congress—"to protect trade and commerce," or in other words, take away hindrances to its promotion and development? Contracts and combinations which really restrain trade or commerce are still condemned and it will still be for the courts, as to any contract or combination which is challenged, to decide whether trade or commerce is thereby restrained or pro-

moted. They cannot reach an answer simply through the test question: Does it eliminate or limit competition in any way? But on the other hand, if the contract or combination involves a restriction of competition they are not barred from finding that through *such* restriction of competition, trade or commerce is actually restrained. It is submitted simply that the test applied by the Court below was a false test and should be rejected.

If the law were clear, as held by the Court below, this Court, of course, would not be deterred from so declaring by apprehension as to the results to follow. But such results may properly be considered in determining the meaning of the act. It is pertinent to ask whether the law can reasonably be given a meaning which will bring about such results. And furthermore, if the functions of the Courts in "working out the character of the offences denounced" are largely legislative—as we respectfully suggest that they are—then surely the results to follow from any declaration of the meaning of the act are proper subjects for consideration.

If the combination now before the Court is illegal, then there are thousands of combinations in the form of corporations, associations and partnerships which are illegal. If this combination must be dissolved, so must thousands of others. If those engaged in this combination are criminals, the number of criminals in this country is large beyond the dream of the most vindictive of public prosecutors.

But this is not all. Combination is essential to adequate competition. If every combination in the land should be dissolved and its assets sold or distributed, would there not be many individuals each having overwhelming strength in some line of business? Who could compete with them, if each

man and each man's money must work alone, if two or more may not combine in order to get together strength enough to meet them on fairly equal terms? Adequate competition in almost every field is impossible without combination. To forbid combination is to prevent such competition. It is to create monopoly.

It is hardly necessary to suggest the confusion and disturbance which would come, if the law as declared by the Circuit Court were to be generally enforced. But the practical impossibility of bringing about the dissolution of many existing combinations, and the long time required to effect the dissolution of those which can be dissolved, should not be overlooked. While such combinations still live, the effect of a decision that combinations can no longer be formed will prevent effective competition with existing combinations, and give them substantial monopoly in their several lines of business.

To declare the law as not forbidding every contract or combination which eliminates or limits competition, is to permit contracts or combinations essential to the promotion of trade and commerce, leaving contracts and combinations which really restrain trade or commerce still under condemnation.

THOMAS THACHER,
J. PARKER KIRLIN.

Supreme Court, U. S.
FILED.
OCT 8 1909
JAMES H. McKENNEY,
Clerk.

118.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Appellees.

BRIEF AND ARGUMENT FOR THE DEFENDANT UNITED CIGAR STORES COMPANY, *Appellee.*

STROOCK & STROOCK,
Solicitors for UNITED CIGAR STORES COMPANY, *Appellee,*
30 Broad Street,
New York City.

SOL M. STROOCK,
Of Counsel.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

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IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Appellant, AGAINST THE AMERICAN TOBACCO COMPANY and others, Appellees.	316.

BRIEF AND ARGUMENT FOR THE DEFENDANT, UNITED CIGAR STORES COMPANY, APPELLEE.

Statement of Case.

This is an appeal by the United States from that portion of the decree rendered by the United States Circuit Court for the Southern District of New York, filed December 15th, 1908, which dismissed the petition of the Government as to the defendant United Cigar Stores Company (Record, Vol. I, pp. 331, 336, 339 and 344).

In dismissing the petition against United Cigar Stores Company, the Judges of the Circuit Court acted unanimously. The opinion of the Court concerning United Cigar Stores Company was written by Judge Coxe (Record, Vol. I, pp. 302, 303 and 304). The reasoning and conclusions of Judge Coxe in this regard were concurred in by Judge Lacombe (Record, Vol. I, p. 295), and Judge Noyes while not wholly adopting the views of Judges Lacombe and Coxe with respect to certain of the defendants, concurred in the results which they reached (Record, Vol. I, p. 320). Judge Ward was of the opinion that the petition should be dismissed as to all of the defendants (Record, Vol. I, p. 328).

The position of United Cigar Stores Company as a defendant in this proceeding is unique. It is not and never has been a competitor of any of the other defendants. Its business has been and is that of a retail merchant only. Any combination between the United Cigar Stores Company and any one or more of the other defendants therefore, was not and could not be under any circumstances a restraint of any existing competition.

Judge Coxe writing the opinion of the Circuit Court, says (Record, Vol. I, p. 303):

> "The Cigar Stores Company and the Tobacco Company were not and could not be competitors; the former manufactures and sells tobacco by the wholesale, the latter sells whatever its customers want, no matter by whom manufactured, at retail only."

Facts.

Among the facts found by Judge Coxe are the following (Record, Vol. I, pp. 302-304):

> "In May, 1901, George J. Whelan and associates organized the United Cigar Stores Company for the purpose of retailing cigars and tobacco. This was done without the

knowledge of the American Tobacco Company, which refused to assist the enterprise in any way until its success as a selling agent was clearly demonstrated and established. It was at the suggestion of Whelan, not of the tobacco company, that its money was invested in the enterprise. Thereupon the tobacco company acquired a controlling interest in the stores company which has been held continuously and has been increased from time to time. Whelan and his associates have the active management of the stores company, which deals in the products of the defendants and also of independent manufacturers. No member of the tobacco company or of its subsidiary companies is a member of the board of the Cigar Stores Company, and the evidence falls far short of establishing the proposition that the stores are managed in the interest of the tobacco company to the exclusion of other manufacturers. On the contrary, the weight of testimony is to the effect that the aim and purpose of the stores is to furnish anything that a user of tobacco may desire, no matter by whom made. The company operates about 400 stores, scattered throughout the United States; but when it is realized that there are in this country over 600,000 places where tobacco is sold, the impossibility of monopolizing the retail trade by one who operates only six-tenths of 1 per cent. of these places will at once be apparent. It cannot be assumed that a company which sells the products of all alike intends to secure a monopoly for one. Neither is the fact that the business is conducted in a large number of stores important. * * *

It is true that the Cigar Stores Company has been energetically and, perhaps, aggressively managed; it is true that a part of the business thus built up would have been done by others had the company not been formed, but this is true of every large and successful business. It is the premium which has always been awarded to earnest and intelligent endeavor. The statute was never intended to punish success or reward incompetency. The

proof fails to establish unfair or unlawful methods in acquiring and conducting the business of the cigar stores."

Concerning this defendant, the statements and admissions (Government's Exhibit No. 8) (Record, Vol. V, pp. 17–18), present the following:

> "That in May, 1901, George J. Whelan and associates organized United Cigar Stores Company under the laws of the State of New Jersey, with an authorized capital stock of $2,000,000, of which $1,650,000 has issued, and of which $900,000 is common stock and $750,000 preferred stock, for the purpose of selling cigars; that in November, 1901, The American Tobacco Company acquired a majority of the stock then issued of said company, and subsequent increases of said stock and subsequent acquisitions were made by The American Tobacco Company until it now owns and holds all said preferred stock and $600,000 of its common stock, the remainder of the common stock being held by George J. Whelan and others active in the conduct of the company's business; that this company has issued bonds to the amount of $2,850,000, all of which are held by The American Tobacco Company; that the said Cigar Stores Company operates itself, or companies whose stock it owns operate, stores in the States of New Jersey, New York, Pennsylvania, Ohio, Maryland, Washington, Connecticut, California, Delaware, Oregon, Texas, Massachusetts, Wisconsin and Kentucky, and in the District of Columbia, *in which it sells tobacco products at retail;* that said Cigar Stores Company owns the entire issued capital stock of the United Cigar Stores Company of Chicago, Ill., whose issued capital is $389,800 (except about $14,000); United Cigar Stores Company of Providence, R. I., whose issued capital is $98,000; The Royal Company of New York City, whose issued capital is $100,000; United Cigar Stores Agency of New York, whose issued capital is

$1,000; United Merchants Realty and Improvement Company of Rhode Island, whose issued capital is $500,000; Moebs Cigar Stores Company of Detroit, Mich., whose issued capital is $10,000, and William Baeder & Company of New York, whose issued capital is $25,000."

The petition in paragraph IV (Record, Vol. I, pp. 19-22) contains general charges against all of the defendants. So far as there is any evidence which has been presented, in any way connecting United Cigar Stores Company with these charges, that evidence will be discussed hereafter.

The specific charges affecting United Cigar Stores Company are found in paragraph XI. of the petition (Record, Vol. I, pp. 58, 59 and 60). The answer of United Cigar Stores Company put in issue all of the allegations of the petition and showed affirmatively the following (Record, Vol. I, pp. 190–197).

That it was organized in May, 1901, by George J. Whelan and his associates, without the knowledge of the other defendants.

That since its organization George J. Whelan has been its president, and with his associates in general control of its affairs and policies.

That after its formation, the said Whelan applied to the defendant The American Tobacco Company for financial assistance in building up its business, but that defendant The American Tobacco Company refused to extend such assistance.

That Whelan and his associates thereupon continued the development of the business of United Cigar Stores Company, and by November, 1901, having demonstrated to the defendant The American Tobacco Company their ability to make a success of their undertaking, finally induced The American Tobacco Company at that time to become interested in United Cigar Stores Company.

That $300,000 of the common stock of United Cigar Stores Company was acquired by and issued

to said Whelan and his associates, who at all times have conducted and still do conduct and manage its affairs.

That the effect of its organization and development has been to promote a more healthy state of competition in the retail cigar trade.

That since its organization there has developed throughout the United States a number of retail cigar stores, some operated by individuals and some by corporations, of a higher grade than theretofore existed, and all of them seemingly prospering.

It admits that in a few instances it has taken agreements from some vendors not to engage in the business of retail cigar stores, but each of such agreements was restricted in time and territory for the purposes for which said agreement was given, to wit: the protection of the good will of the particular business conveyed.

That by far the largest percentage of the retail cigar stores owned and operated by it were established in new locations which had never been in any way theretofore connected with or identified with the retail cigar trade.

With regard to the other companies, in which the defendant United Cigar Stores Company is interested through stock ownership, the answer shows the following: (*a*) That United Cigar Stores Company Agency is maintained in order to handle the mail order business of the defendants. All sales through this mail order business were at retail. (*b*) That United Cigar Stores Company of Illinois and United Cigar Stores Company of Rhode Island are maintained as separate companies for the better and more economic handling of the business. (*c*) That the Royal Company of New York and the Moebs Cigar Stores Company of Detroit, Mich., were operated in order to conduct business upon a credit basis as distinguished from the general business of United Cigar Stores Company, which is conducted upon a strictly cash basis only. (*d*) That Moebs

Cigar Stores Company has ceased to do any business, and that its corporate existence is still maintained by reason of its liability upon a lease made by it. (*e*) That William Baeder & Company holds itself out openly as the agent of this defendant in the operation of stores in a few small cities. (*f*) That United Merchants Realty and Improvement Company was organized and is maintained for reasons of business policy to attend to the leasing of stores and locations in which the company conducts its business.

Regarding Government's Exhibit No. 8, paragraph XV. (Record, Vol. V, p. 31), referring to the defendants who are engaged in interstate commerce, and to the method by which the vendors and corporation defendants purchased their raw material and transported it through the medium of common carriers to factories and filled their orders, the provisions of that paragraph have no reference to the defendant United Cigar Stores Company, for it applies only to such of the defendants as are mentioned in the petition as engaged in *the manufacture* and sale of tobacco products. This defendant is not and never was engaged in *manufacturing* tobacco products.

POINT I.

United Cigar Stores Company has not made any contract, nor engaged in any combination in the form of trust or otherwise, nor in any conspiracy in restraint of trade or commerce among the several states, or with foreign nations.

The consideration of this question naturally divides itself into five main subdivisions:

1st. *United Cigar Stores Company has not made any contract, nor has it engaged in any combination or conspiracy with the other defendants or any of them, directly restraining the interstate commerce of the other defendants or any of them.*

2nd. *United Cigar Stores Company has not made any contract, nor has it engaged in any combination or conspiracy with the other defendants, or any of them, directly restraining the interstate commerce of the United Cigar Stores Company.*

3rd. *United Cigar Stores Company has not made any contract, nor has it engaged in any combination or conspiracy with the other defendants, or any of them, directly restraining the interstate commerce of any competitor of the other defendants or any of them.*

4th. *United Cigar Stores Company has not made any contract, nor has it engaged in any combination or conspiracy with the other defendants, or any of them, directly restraining the interstate commerce of any competitor of United Cigar Stores Company.*

5th. *United Cigar Stores Company has not made any contract nor has it engaged in any combination or conspiracy with the other defendants, or any of them, directly restraining interstate commerce so far as the public or consumers are concerned.*

THE BURDEN OF PROOF IS UPON THE GOVERNMENT TO ESTABLISH THAT THIS DEFENDANT MADE A CONTRACT OR ENGAGED IN A COMBINATION OR CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE.

In order that there shall be a combination or conspiracy within the meaning of the Act, there must be something more than mere uniting; there must be an agreement to do something—an agreement to secure action. This is further shown by an examination of the concluding paragraph of Section 1 of the Sherman Anti-trust Act:

> "Every person who shall *make* any such contract or *engage in* any such combination or conspiracy shall be deemed guilty of a misdemeanor."

It is submitted that the word "make" and the words "engage in" signify the same thing—an agreement to do that which amounts to a restraint of interstate trade. The mere possession of power to restrain would seem to be insufficient; the possession of the power coupled with an agreement to exercise that power—to do something or to attempt to do something in restraint of interstate trade, determines the object and purpose of the combination, and in that aspect falls within the condemnation of the Act. But the existence of the combination with power to restrain—and nothing more appearing—would not bring it within the condemnation of the Act. This Court has consistently recognized the distinction, well known in the criminal law, between mere *preparation*, which may be either conscious or unconscious, and *attempt*, which always is conscious. This distinction was pointed

out by Mr. Justice Holmes in the *Swift case* (196 U. S., 375) at page 402, citing *United States* v. *Knight*, 156 U. S., 1, 13, and *Kidd* v. *Pearson*, 128 U. S., 1, 23, 24.

In the same way in *Loewe* v. *Lawlor*, 208 U. S., at 297, Chief Justice Fuller held:—"The object and intention of the combination determined its legality."

The object and intention of the combination in the cases cited by the Chief Justice in arriving at this conclusion, were not to restrain interstate commerce.

We now come to an examination of the facts as disclosed by the Record, concerning the various forms of combinations and conspiracies above adverted to, and for that purpose we propose to examine the allegations of the petition in connection with the denials and the affirmative allegations contained in the answer, and then see how far the evidence bears out the allegations of the petition.

1st. *United Cigar Stores Company has not made any contract, nor has it engaged in any combination or conspiracy with the other defendants or any of them, directly restraining the interstate commerce of the other defendants or any of them.*

A careful examination of the petition fails to disclose any charge or any allegation which by inference could be deemed to charge, that any attempt was ever made to make any agreement or contract or to engage in any combination or conspiracy of any kind which would restrain in the slightest degree the interstate commerce of any of the other defendants. The Record is barren of any attempted proof in this regard.

2nd. *United Cigar Stores Company has not made any contract, nor has it engaged in any combina-*

tion or conspiracy with the other defendants or any of them, directly restraining the interstate commerce of the United Cigar Stores Company.

There is nothing in the Record to show that any contract was made or that any combination or conspiracy was engaged in to restrain the trade in interstate commerce of United Cigar Stores Company.

A. United Cigar Stores Company has not now, and never has had any trade in interstate commerce which could be restrained. The only business it ever carried on was and is the sale of goods at retail (Record, Vol I, pp. 302 and 303; Record, Vol. V, pp. 17–18). It ships goods by common carriers from its own depots in several cities in the United States to its stores in the different cities throughout the United States, where the goods mingle with the common mass of property in those cities and are disposed of at retail over the counter to the consumer.

This business in which the United Cigar Stores Company is so engaged, is not interstate commerce within any of the accepted definitions of the term.

Hopkins v. *United States*, 171 U. S., 578.

Gibbons v. *Ogden*, 9 Wheaton, 1.

Howard v. *Illinois Central Railroad Co.*, 207 U. S., 463.

Ware v. *Mobile County*, 209 U. S., 405.

In *Hopkins* v. *United States, supra, at page 587*, Mr. Justice Peckham said:

> "The first inquiry to be made is as to the character of the business in which defendants are engaged, and if it be not interstate commerce, the validity of this agreement not to transact their business with non-members does not come before us for decision.
>
> We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it

> has been used and understood in the decisions of this Court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner?"

At page 597 of the same case, he says:

> "Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this Court that it is a term of very large significance."

Referring to the definition of "commerce," as expounded by Chief Justice Marshall, in *Gibbons* v. *Ogden*, *supra*, we quote from the opinion of Mr. Justice White in *Howard* v. *The Illinois Central Railroad Company*, *supra*, at page 493:

> "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. * * * The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the Government."

This decision is in line with the previous decisions of this Court:

Brown v. *Houston*, 114 U. S., 622.
Pittsburg and Southern Coal Co. v. *Bates*, 156 U. S., 577.
Louisville & Nashville R. R. Co. v. *Kentucky*, 161 U. S., 677.

However interstate commerce may be affected by the carrying on of the business of the United Cigar Stores Company, it is evident that its effect is indirect to the remotest degree. By engaging (if at all) in interstate commerce to this very slight and unsubstantial degree, it can reasonably be said within the meaning of the *Howard* case, that United Cigar Stores Company did not thereby submit to the control of Congress under the Commerce Clause all of its affairs which were completely within each particular State in which its stores were respectively located. This court has substantially held this doctrine in *Cincinnati Packet Company* vs. *Bay*, 200 U. S., at page 184.

B. If we assume, however, for the purpose of argument, that United Cigar Stores Company had some interstate trade which could be interfered with or restrained, what does the Record show with regard to such restraint?

We do not contend that because United Cigar Stores Company has not engaged in interstate commerce that, therefore, if it made any contract, or engaged in any combination or conspiracy in restraint of interstate commerce, it would be exempt from the penalties of the Act.

Loewe v. *Lawlor*, 208 U. S., 274.

It is clear from the Record that the relationship existing between the United Cigar Stores Company and the other defendants is that of customer and manufacturer (Cobb, Record, Vol. III, pp. 36 and 74). In this connection it is important to note that over 70 per cent. of the business transacted by the United Cigar Stores Company is in cigars, the remaining 30 per cent. being divided between sales of cigarettes, smoking and chewing tobaccos, pipes, smoker's articles, etc. (Whelan, Record, Vol. III, p. 108).

If any restraint, therefore, upon the trade of United Cigar Stores Company were to be found, it would naturally be looked for in its relations with

the American Cigar Company, which sells cigars. Every witness who testified in the case shows that the United Cigar Stores Company, in operating its business, is absolutely free. Whatever conferences have been had between the two companies have been with a view of increasing business; the American Cigar Company as a merchant desiring to sell United Cigar Stores Company as large an amount of goods as possible (Cobb, Record, Vol. III, p. 44). United Cigar Stores Company has not only been free in operating its business, but has always been free as to the cities in which it will operate, and as to the locations in which it will maintain stores (Whelan, Record, Vol. III, pp. 116, 119; Hill, Record, Vol. II, pp. 234, 415; Cobb, Record, Vol. III, pp. 36, 74; Duke, Record, Vol. IV, p. 415).

Attention is directed to the fact that the petition in this case was filed July 10, 1907, and that the case was finally submitted to the Judges of the Circuit Court in May, 1908. It is to be assumed that, before filing the petition, the Government made a most careful inquiry and investigation regarding the allegations in the petition. During the period which elapsed between the filing of the petition and the final submission of the case, all of the books, papers and documents of all of the companies, including more than five thousand letters and copies of letters, as well as the private letter books and memoranda of the officers of the various companies were at the command of, and were inspected and carefully examined by the Government (Hill, Record, Vol. II, 360-362; Dula, Record, Vol. II, 684 and 685). What was the result of this very searching inquiry and examination concerning the relations of United Cigar Stores Company and the other defendants so far as interference and restraint is concerned? In the first place, we find that a special allowance of 10 per cent. upon increased business by The American Tobacco Company and its subsidiary companies was at one time allowed to the United Cigar Stores Company, and that the purpose of this was to give the United Cigar Stores Company an impetus to in-

crease its business, not to diminish it (Hill, Record, Vol. II, p. 404).

It is true that Mr. Cobb, the president of the American Cigar Company, was at one period (1905) personally opposed to the extension of the United Cigar Stores Company and to the opening of additional stores outside of the larger and more important cities of the United States. This was his personal opinion, concurred in by members of the so-called executive committee of The American Tobacco Company (Cobb, Record, Vol. III, p. 45), and was communicated to Mr. Whelan, the president of the United Cigar Stores Company, not with any view of directing him what to do, but in order to give him the benefit of the opinion of the executive committee. As a matter of fact, however, notwithstanding this opinion, Mr. Whelan and his associates went right along opening stores wherever they decided upon and wherever they wished (Cobb, Record, Vol. III, p. 46; Whelan, Record, Vol. III, p. 121). In fact, particular attention was called by the Government to the fact that this executive committee of The American Tobacco Company suggested that it would be unwise for the United Cigar Stores Company to open a store in Springfield, Mass. (Cobb, Record, Vol. III, p. 46). The Record, however, clearly shows that notwithstanding this suggestion, United Cigar Stores Company proceeded to and did open stores in Springfield, Mass. (Cobb, Record, Vol. III, p. 76; Whelan, Record, Vol. III, p. 121). The only other instance which the Government was able to find of any alleged attempt to interfere with the proposed locations of United Cigar Stores Company, was presented in a private letter dated November 6th, 1902, written by Mr. Hill, the vice-president of The American Tobacco Company, to Mr. Duke, the president thereof, in which Mr. Hill wrote that he had advised that the United Cigar Stores Company should not open at that time in any other localities, but to push ahead

its New York, Chicago and Kansas City stores as rapidly as possible (Hill, Record, Vol. III, p. 127). As a matter of fact the Record discloses that notwithstanding this advice United Cigar Stores Company proceeded to and did open stores in other localities, and that The American Tobacco Company did not assume to restrict the United Cigar Stores Company as to the number of its stores or as to the cities in which it might open and operate stores (Hill, Record, Vol. III, p. 144).

Regarding any effort at interference with the business of the United Cigar Stores Company the Judges of the Circuit Court found unanimously against the contention. *Judge Coxe*, writing the opinion, says (Record, Vol. I, p. 304):

> " No special privileges are accorded by the Tobacco Company to the Cigar Stores Company over other purchasers. Their business is conducted in their own way, without dictation from the Tobacco Company. I do not overlook certain sporadic instances of fault finding and attempted interference in the business by certain officers of the Tobacco Company, but these attempts were negligible and should not be considered in determining the general character of the business. Generally speaking, the relations existing between the two were those of a manufacturer and a retail customer to whom the manufacturer sells direct."

The sporadic instances of fault finding and attempted interference to which Judge Coxe evidently referred were the letters above referred to, and the letter written by Mr. Hill, vice-president of The American Tobacco Company, to Mr. Whelan on March 7th, 1903 (Hill, Record, Vol. III, p. 130). In this letter Mr. Hill complained that goods manufactured by competitors of the American Tobacco Company were given preference by clerks of the United Cigar Stores Company over goods manufactured by the American Tobacco Company. There was no attempt in this letter to intimate that goods

of competitors should not be handled or dealt in by United Cigar Stores Company. In fact, the letter itself shows how conspicuously such independent goods were displayed by United Cigar Stores Company and what decided efforts were made to push their sale. All that the letter discloses is a demand that when a customer enters a store and asks for no established brand, that preference should be given to the goods manufactured by The American Tobacco Company, a demand of the character which any manufacturer might very well make of any retailer to whom he sold goods and which the retailer might comply with or not as he chose. The Record is barren of any evidence showing that after the sending of this letter there was any change in the attitude of United Cigar Stores Company toward independent tobacco products and the absence of such evidence (so easily procurable by the Government, if it existed) demonstrates that thereafter United Cigar Stores Company continued to conduct its business in its own way, and displayed its merchandise as it saw fit. This phase of the matter will be discussed later when we come to consider the charge that the United Cigar Stores Company has been used as an instrument to hinder the sale of goods manufactured by competitors of The American Tobacco Company.

The only other instance of the kind which appears in the Record is contained in a letter dated July 21st, 1905, written by Mr. Hill to Mr. Whelan (Hill, Record, Vol. II, p. 340) in which Mr. Hill complained that a brand of cigarettes known as Pall Mall (not manufactured by The American Tobacco Company) was placed in one of the stores of United Cigar Stores Company at a point more convenient to the clerk's hands than were the cigarettes of The American Tobacco Company. There was no attempt to interfere with the handling of this independent brand of cigarettes by the United Cigar Stores Company (Hill, Record, Vol. II, p. 400). The Record, however, is barren

of any evidence showing that after the sending of this letter any change was made by United Cigar Stores Company in handling this brand of cigarettes (Pall Mall) or that any change was made in the location of the cigarettes in its stores so as to have them less convenient to the hands of the clerks than were the cigarettes of The American Tobacco Company. If any change was made as a result of this letter, the evidence thereof could easily have been procured by the Government, and the failure of the Government to produce any such proof is corroborative of the evidence that United Cigar Stores Company continued to operate its business in its own way, unhampered and unhindered.

By the Record it appears that in a letter dated September 16th, 1903, written by Mr. C. C. Dula, one of the vice-presidents of The American Tobacco Company to one of the salesmen in New England of the Continental Tobacco Co. (Dula. Record, Vol. II, pp. 663–664), he disapproved of the display by United Cigar Stores Company at Providence, R. I., of "Central Union Plug" in its window dressing. It will be observed that this letter was addressed not to any representative of United Cigar Stores Company, but to the representative of the Continental Tobacco Co. As a matter of fact the Record shows that no such complaint was ever made to United Cigar Stores Company, or to any of its officers, nor was any attempt made to interfere with its handling of Central Union Plug (Dula Record, Vol. II, p. 725). Again, the Record fails to disclose that after the writing of this letter by Mr. Dula to his own representative, that "Central Union Plug" was not as prominently displayed in the windows of United Cigar Stores Company as theretofore. If such display were ever discontinued by United Cigar Stores Company, it is evident that the proof thereof could easily have been procured by the Government, and the failure to produce such proof may therefore be said to be conclusive that no change in its methods

occurred, directly or indirectly, as a result of that letter.

In the above summary we have not picked out special instances of complaint, but we have enumerated specifically every complaint and every attempt at interference which the Record discloses during the entire history of the United Cigar Stores Company. We have seen that the attempted interference (if such it may be called) was in every instance without result, and that the Circuit Court was correct in its conclusion that these instances of fault finding and attempted interference by certain officers of the Tobacco Company were "sporadic," attempts, "negligible, and not worthy of consideration in determining the general character of the business."

The Record shows affirmatively that there never was any agreement or contract of any kind, made by United Cigar Stores Company with any of the other defendants. All arrangements that were ever made with United Cigar Stores Company with regard to special allowances on their purchases, or for any other purposes could be terminated at any minute (Hill, Record, Vol. II, p. 348). United Cigar Stores Company never had any contract or agreement with The American Tobacco Company relative to the marketing of its goods (Hill, Record, Vol. II, p. 408), nor for any other purpose (Dula, Record, Vol. II, p. 725).

C. It is charged in the petition that in November, 1901, in pursuance of their general purpose, defendants acquired control of the business of United Cigar Stores Company (Record, Vol. I, pp. 58-59).

The undisputed evidence shows that there was no attempt on the part of The American Tobacco Company, at any time to acquire control of United Cigar Stores Company. This was found as a fact by the Judges of the Circuit Court (Record, Vol. I, p. 302).

Mr. George J. Whelan, the president of United

Cigar Stores Company testified (Whelan, Record, Vol. III, p. 98 and ff), that he had been president of the company since its organization in May, 1901; that he had caused the company to be organized without the knowledge of The American Tobacco Company (Hill, Record, Vol. II, pp. 231 and 414; Duke, Record, Vol. IV, p. 414), that he had spoken to one or two of the officers of The American Cigar Company to try to get them to interest themselves with him and his associates in forming a company to sell cigars at retail but that they declined to do anything, so that Whelan established this company without their assistance and without their knowledge. All of the evidence in the case corroborates this statement. Whelan had been trying ever since the organization of the company to get The American Tobacco Company to take an interest in the United Cigar Stores Company, but he could not get its officers to do so until November or December, 1901 (Whelan, Record, Vol. III, p. 99). Up to that time there had been invested by Whelan and his associates approximately $50,000 in the stock of the company, and upon Whelan's insistence, the paid up capital was increased to something in excess of $100,000 of which the representatives of The American Tobacco Company acquired 51 per cent., Whelan and his associates retaining their original investment. This investment, however, remained at this comparatively small figure for a year or two afterwards. From that time on as the stock was increased, Mr. Whelan and his associates took their share of the common stock. They owned one-third of the common stock, and they had the right to subscribe to 49 per cent of the preferred stock; in the same way when the United Cigar Stores Company issued bonds, Whelan and his associates had an equal right to take those bonds. It was not until Whelan and his associates had demonstrated that they were able to conduct the business of United Cigar Stores Company profitably, that The American

Tobacco Company purchased an interest in the business, for it was only after Whelan had shown that between May, 1901, and November, 1901, United Cigar Stores Company had earned about $2,000 upon an investment of approximately $50,000, that The American Tobacco Company was induced to acquire an interest (Whelan, Record, Vol. III, p. 114). One or two years elapsed before The American Tobacco Company saw that the business was sufficiently profitable to invest further moneys in the venture (Whelan, Record, Vol. III, p. 100).

Mr. Whelan had started in the retail cigar business in 1883, at Syracuse, New York (Whelan, Record, Vol. III, p. 112). When he went to New York City early in 1901, he started to organize United Cigar Stores Company, and during that time neither The American Tobacco Company, nor any of its subsidiary or allied companies nor any of its or their officers had any interest, direct or indirect, in the United Cigar Stores Company (Whelan, Record, Vol. III, p. 113). Mr. Whelan tried to induce cigar manufacturers, leaf dealers, and every one whom he knew to be connected with the tobacco trade, to acquire an interest in United Cigar Stores Company, and for that purpose he made flattering offers to all of these people, without result. It was only after these offers had been declined that he went again to The American Tobacco Company and succeeded in inducing them to take an interest in his concern (Whelan, Record, Vol. III, p. 113; Duke, Record, Vol. IV, pp. 414–415).

Since The American Tobacco Company acquired an interest in the stock of United Cigar Stores Company, the business of United Cigar Stores Company has been conducted continuously by Whelan and his associates, without any interference by the American Tobacco Company or by any of its associated companies or officers (Whelan, Record, Vol. III, p. 116; Hill, Record, Vol. II, p. 234, 415; Cobb, Record, Vol. III, p. 36, 74; Duke, Record, Vol. IV, p. 415). The business of the United Cigar Stores Com-

pany has never been subordinated in any way to the directions of The American Tobacco Company, or of any of its affiliated companies; none of its officers have ever been identified with The American Tobacco Company, and the location of its general offices has always been separate; the directors of the United Cigar Stores Company were always chosen by Whelan and his associates (Whelan, Record, Vol. III, p. 116).

From the foregoing brief summary it is evident that it certainly was not with any purpose to restrain trade or to prevent competition or with any unlawful design, that The American Tobacco Company originally acquired an interest in the stock of the United Cigar Stores Company.

D. We now propose to examine the effect of the following allegation in the petition:

"The American Tobacco Company holds $600,000 of the $900,000 common stock, all of the preferred stock $750,000 and $2,850,000 of the company's bonds."

Assuming all of the parties to be engaged in interstate commerce, the fact of stock ownership by The American Tobacco Company in the United Cigar Stores Company does not constitute a violation of the Act.

The manner in which The American Tobacco Company acquired stock in United Cigar Stores Company and its object in acquiring it has been discussed in the preceding pages of this brief (pp. 19 to 21).

In Northern Securities Co. v. *United States, 193 U. S., 197*, Mr. Justice Harlan, at page 333, says:

> " It is said that whatever may be the power of a State over such subjects, Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a state corportion, or the purchase by individuals, of the stock of another corporation, for whatever purpose,

are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens or state corporations may dispose of their property and invest their money in any way they choose; and that in regard to all such matters, citizens and state corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination." * * *

At page 334 he continues:

"It (the Government) does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce."

And finally at 354 he says:

" However that Company (Northern Securities Company) may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used *in suppressing competition between those companies.* It came into existence only for that purpose. * * * The direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in United States *v.* Joint Traffic Assn.), '*smothering*' competition between the lines of two railway carriers."

Unless, therefore, there is something in the evidence to show that the stock in the United Cigar

Stores Company, held by The American Tobacco Company, was acquired and held, to be used in suppressing competition, or in attempting directly so to do, there can be no lawful objection. Reference is here made to the forceful dissenting opinion of *Mr. Justice White* in the *Northern Securities case*, in which after elaborately reviewing all of the authorities he comes to the conclusion (p. 377) that the very definition of the power to regulate commerce as announced in *Gibbons* v. *Ogden*, 9 Wheat., 1, excludes the conception that it extends to stock ownership.

In *United States* v. *Knight*, *supra*, the Chief Justice said, at page 17:

> "The subject matter of the sale was shares of manufacturing stock,"

and at page 16, he said:

> "It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted."

In the *Northern Securities Case, 193 U. S., 197*, the stock which the Northern Securities Company acquired was stock in two *competing* railroad companies. The effect of such ownership was expressed by Mr. Justice Harlan, at page 326:

> "Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated

> corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease * * *. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected."

This is quite a different state of affairs from the case which is here presented, in which The American Tobacco Company acquired stock in the United Cigar Stores Company. The two companies were never in competition, and from the nature of things could not be. The American Tobacco Company devoted itself to the *manufacture and sale* of tobacco products *at wholesale*, while the United Cigar Stores Company devoted itself to the *sale* of tobacco products *at retail only*. No competition ever having existed between the two companies, and it being impossible from the nature of things that any could exist, how can it be said that the acquiring by The American Tobacco Company of stock in the United Cigar Stores Company restrained any competition then existing or contemplated in the future, or restrained trade in any way?

Whitwell v. *Continental Tobacco Company*, 125 Fed. R., 454.

Phillips v. *Iola Portland Cement Co.*, 125 Fed., 593.

In the language of Mr. Justice White in the *Northern Securities Case* (193 U. S. at page 498), this case involves the right to *acquire and own*, not the right "*to do.*" The right to acquire and own such stock in itself is not forbidden by the Act. In fact it has recently been held (*Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. R., 704), even whether the stock so acquired was stock of a *competing* cor-

poration, something more than mere acquisition and ownership is required to constitute a violation of the act.

In *Bigelow* v. *Calumet & Hecla Mining Co., supra,* Lurton, *C. J.*, at page 728, says:

> "But if the presumption be, in respect to a question of restraint or monopoly under the Act of Congress, that the power to determine the management of a competing corporation through ownership of a majority of shares constitutes a suppression of competition, we come to the inquiry as to whether such presumption is one of fact or law. If one of fact, as it evidently is, it is rebuttable. We quite agree that purpose or motive is of no moment, provided the contract or agreement directly provided for the suppression of competition, or when such a result, as a matter of law, must necessarily occur (United States *v.* Freight Ass'n, 166 U. S., 291; 17 Sup. Ct., 540, 41 L. Ed., 1007; Chesapeake & Ohio Fuel Co. *v.* United States, 115 Fed., 610, 623, 53 C. C., 256). But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence of an unlawful intent becomes essential, that the Court may see that, if not stopped, a prohibited restraint is likely to be created."
>
> Citing *Swift* v. *United States,* 196 U. S., 375.

Applying the language of *Mr. Justice Holmes* in *Swift* v. *United States,* at page 396, we find that the mere ownership of such stock in itself not being sufficient to produce a result which the law seeks to prevent—for instance, the monopoly—but requiring further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. The Record shows an entire absence of such intent.

This will be discussed later in this brief (*post*, pp. 45 & ff.).

3rd. *United Cigar Stores Company has not made any contract, nor has it engaged in any combination or conspiracy with the other defendants or any of them, directly restraining the interstate commerce of any competitor of the other defendants or any of them.*

The petition charges (Record, Vol. I, p. 59) that

> "Under an agreement with and direction of The American Tobacco Company the United Cigar Stores Company promotes and furthers the sale of tobacco products manufactured by defendants and hinders and obstructs the sale of products of independents, either refusing to handle them or to treat them fairly. * * *
>
> This company for a long time concealed and denied association with defendants and has been and is used by them as an instrument * * * to cripple other distributors of tobacco with the view of driving them out, destroying competition, and preventing others from entering."

At the outset we state that the Record from which we have heretofore quoted shows conclusively that no agreement of any kind was entered into between any of the other defendants and the United Cigar Stores Company (*ante*, p. 19). That United Cigar Stores Company promotes and furthers the sale of tobacco products manufactured by the defendants is not gainsaid, nor can there be the slightest suggestion that there is any violation of the Act in so doing. Far from hindering and obstructing the sale of products of independents, either by refusing to handle them or to treat them fairly, the Record abounds with evidence (Hill, Record, Vol. II, pp. 365, 722 and 725; Whelan, Record, Vol. III, p. 124; Duke, Record, Vol. IV, p. 416) affirmatively and conclusively proving that not only is the above quoted allegation unfounded and unproven, but that

the contrary has been and is the result of the operation of United Cigar Stores Company, which has at all times since its organization been free to deal in and actually has dealt in any tobacco products for which there has been a public demand, whether the same were manufactured by any of the other defendants or by their competitors.

The Circuit Court found specifically that United Cigar Stores Company deals in the products of the other defendants and also in the products of independent manufacturers (Record, Vol. I, p. 302); and that "the evidence falls far short of establishing the proposition that the stores are managed in the interest of the tobacco company to the exclusion of other manufacturers. On the contrary, the weight of testimony is to the effect that the aim and purpose of the stores is to furnish anything that a user of tobacco may desire, no matter by whom made (Record, Vol. I, p. 302). * * * The proof fails to establish unfair or unlawful methods in acquiring and conducting the business of the cigar stores" (Record, Vol. I, pp. 303-304).

That United Cigar Stores Company has consistently followed the policy of buying its goods wherever it could buy them cheapest and selling whatever is in demand in each particular locality, the Record conclusively shows (Whelan, Record, Vol. III, p. 115). As an example of this, it appears that the purchases of United Cigar Stores Company from Schinasi Bros., one of the largest cigarette manufacturing concerns in the United States (not in any way connected with The American Tobacco Company), increased from twelve million cigarettes in 1902 to forty million cigarettes in 1907 (Whelan, Record, Vol. III, p. 115). In fact, the testimony of the Messrs. Schinasi themselves discloses that the purchases in each year of the United Cigar Stores Company from their concern are larger than those of every other concern, except one, in the United States (M. Schinasi, Record, Vol. IV, p. 662; S. Schinasi, Record, Vol. IV, p. 665). The Record fur-

ther shows that United Cigar Stores Company alone buys not less than twenty-five per cent. of the total production of certain other manufacturers not connected with The American Tobacco Company (Whelan, Record, Vol. III, p. 115).

Mr. Hillman, a large jobber and distributor of tobacco products not manufactured or produced by any of the defendants, a witness called by the Goverment, testified that United Cigar Stores Company bought practically all of the brands which he handled (Hillman, Record, Vol. III, p. 499), and that in addition to the goods which it purchased from him that he knew of his own knowledge that it bought directly from independent factories a considerable quantity of the tobacco products which it sold at retail (Hillman, Record, Vol. III, pp. 500, 501). Moreover Mr. Hillman in his testimony showed that United Cigar Stores Company purchases on credit from his concern between $60,000 and $70,000 worth of merchandise in each year (Hillman, Record, Vol. III, p. 501), which did not include purchases made by the United Cigar Stores Company from him for spot cash, of which he kept no record (Hillman, Record, Vol. III, p. 604); that the largest amount of business that his concern ever did in any one year was $325,000, so that it is apparent on the face of it that the amount of the purchases of the United Cigar Stores Company from Mr. Hillman alone were in excess of twenty-five per cent. of his total sales in each year; and that United Cigar Stores Company was the largest handler beyond question in New York City of the "Pall Mall" cigarette, which was manufactured by Butler & Butler (Hillman, Record, Vol. III, p. 500). Mr. George P. Butler, the manufacturer of that cigarette, testified that this defendant was a large dealer in "Pall Mall" cigarettes (Butler, Record, Vol. III, p. 580).

Mr. Bendheim, president of the Metropolitan Tobacco Company, a large distributor of tobacco products manufactured not only by The American Tobacco Company, but also of tobacco products man-

ufactured by other concerns, not connected in any way with any of the defendants, testified that United Cigar Stores Company purchased from his concern tobacco products other than those manufactured by The American Tobacco Company and its allied companies (Bendheim, Record, Vol. III, p. 274).

There is not a line in the Record to show that the United Cigar Stores Company at any time concealed and denied association with the other defendants. The American Tobacco Company did not make public the fact that it had acquired an interest in the United Cigar Stores Company, for the reason that it did not consider it a good thing for a manufacturer to advertise himself as being in the retail business (Hill, Record, Vol. II, p. 403). While United Cigar Stores Company is the only retailer to whom The American Tobacco Company sells directly in New York City, it is nevertheless true that a majority of The American Tobacco Company's customers in other cities are retailers as well as wholesalers (Hill, Record, Vol. II, p. 403).

The foregoing discussion under this point has proceeded upon the theory that interstate commerce may have been in some way interfered with. The Record is barren of any proof that the business of any competitor of any of the other defendants engaged in interstate commerce was in any way interfered with. We do not, of course, claim that in order to constitute a violation of the Act, the competitor whose business has been so interfered with, must be engaged in interstate commerce, but we do insist that if such competitor is not engaged in interstate commerce, that then it must appear by some other evidence that a combination in restraint of interstate trade exists. We find nothing contrary to this doctrine in *Chattanooga Foundry* v. *City of Atlanta, 203 U. S., 390*, nor in any of the decided cases. But as we have seen, no combination, contract or conspiracy in restraint of the trade of any competitor of the other defendants ever existed,

and no such combination, contract or conspiracy was ever attempted to be made, or engaged in.

4th. *United Cigar Stores Company has not made any contract, nor engaged in any combination or conspiracy with the other defendants or any of them, directly restraining the interstate commerce of any competitor of United Cigar Stores Company.*

The petition charges in this regard as follows (Record, Vol. I, p. 59):

> "It (United Cigar Stores Company) has likewise at tremendous cost set up retail stores at prominent places in various cities, and by means of the powerful support of defendants is seeking to acquire control of the retail business in tobacco products and thus render all competition with them more nearly impossible. * * * United Cigar Stores Company has acquired in various ways the business of many retailers and procured and forced their retirement."

The Record is barren of proof of any attempt made either with or without the support of the defendants to acquire control of the retail business in tobacco products and to render competition more nearly impossible. Judge Coxe, in his opinion in the Court below, succinctly and forcibly points out the absurdity of this contention (Record, Vol. I, pp. 302–303):

> "The company operates about 400 stores, scattered throughout the United States; but when it is realized that there are in this country over 600,000 places where tobacco is sold, the impossibility of monopolizing the retail trade by one who operates only six-tenths of 1 per cent. of these places will at once be apparent. It cannot be assumed that a company which sells the products of all alike intends to secure a monopoly for one. Neither is the fact that the business is conducted in a large number of stores important."
>
> "The statute was not intended to strike down enterprise or to prevent the restraint of

> trade by destroying it. Many large merchants find it profitable to conduct their business through a chain of stores, and it has never been held that the mere fact that a business is large and is extended over a wide territory renders its promotors amenable to the statute. Success is not a crime."

The proposition now under discussion brings us to this question: *What has been done by United Cigar Stores Company either alone or in combination or in conspiracy with any of the other defendants, to drive retail competitors of United Cigar Stores Company out of business?*

This is the substance of the charge contained in the Government's petition, and this is in effect the charge which has been repeated by newspapers throughout the country, based upon the assumption that when the Government made these allegations in its petition, it had in its possession the proof necessary to establish it.

Remembering as we must, that the Government had every record of United Cigar Stores Company and of the other defendants at its command, that it had recourse to all of the reports filed by the other defendants in a number of States throughout the Union required by the laws of those States, that it had open to it every means of communication with the proprietors of the 599,595 stores, stands and places at which tobacco was sold at retail, not controlled by any of the defendants, and that there certainly was every inducement for every retailer who had been driven out of business or who had been unjustly injured in his business by means of the operation of United Cigar Stores Company to come forward and under the protection of the Government to tell his story, it is significant that the Record fails to disclose that even one retailer in any part of the United States was thereby driven out of business or hindered or impaired in carrying on his business. The failure of the Government to produce any such proof under all

of these circumstances, is in itself potent evidence that no such results followed from the organization and operation of United Cigar Stores Company.

Not only is there an absence in the Record of any evidence that any retailer was driven out of business or injured in his business by means of the operation of United Cigar Stores Company, but the Record shows affirmatively that directly the opposite has been the result of the operation of this company.

(1) Although there are over 600,000 cigar stores and stands (Hill, Record, Vol. II, p. 363) in this country, this defendant owns and operates only 405, or as Judge Coxe points out, less than one-sixth of one per cent. of the whole (Record, Vol. I, p, 302).

(2) The number of retail stores has increased since this defendant has been in business (Whelan, Record, Vol. III, p. 113). This is also shown by the fact that the sales of the Metropolitan Tobacco Company, which is the largest distributor of tobacco products of all kinds in New York City, have increased since United Cigar Stores Company commenced to do business, even if there be eliminated from the amount of such sales, the purchases made by United Cigar Stores Company from Metropolitan Tobacco Company (Bendheim, Record, Vol. III, p. 274). The number of customers of the Metropolitan Tobacco Company has materially increased since 1901 (the year of the incorporation of United Cigar Stores Company), and the total number of its sales to customers other than United Cigar Stores Company, has likewise increased during that period (Bendheim, Record, Vol. III, p. 275).

(3) Of the 405 stores operated by United Cigar Stores Company, very few indeed were acquired by purchase or otherwise from persons who had been in the tobacco business theretofore. Almost all of

those stores were opened as new stores by the United Cigar Stores Company itself (Whelan, Record, Vol. III, pp. 98–99). In one instance the business of a retail firm in Providence, Rhode Island, was purchased, but before the purchase was made, an organization in Rhode Island was effected in order to get the services of the proprietors of that business, because United Cigar Stores Company wanted the benefit of those men in its business. The stores which they owned were purchased by this organization, after its completion, not in any way to force the retirement of the proprietors, but in order to get the benefit of their services in building up the organization of the United Cigar Stores Company (Whelan, Record, Vol. III, p. 102). In the same way the subordinate organizations of United Cigar Stores Company, referred to in the petition (Record, Vol- I, p. 60), were organized by the United Cigar Stores Company itself for the proper economic extension of its business in various sections of the country in a systematic way; in organizing these companies businesses which had theretofore been in existence do not appear to have been taken over (Whelan, Record, Vol. III, pp. 102–106 and p. 118), and all of these companies were operated and have always been operated openly as United Cigar Stores Company propositions (Whelan, Record, Vol. III, pp. 102–106, and p. 118).

(4) Far from forcing the retirement of any retailers whose businesses were purchased by United Cigar Stores Company, the record shows affirmatively that such has not been the case, but that a good many of the men whose stores were purchased have subsequently gone into business on their own account and have been successful (Whelan, Record, Vol. III, p. 122).

Of the 600,000 retailers in the country, the Government called as a witness only one—Mr. D. A. Schulte. His testimony showed how unfounded

were the Government's contentions (Schulte, Record, Vol. III, pp. 462 and ff.). While on his direct examination by the Government, Mr. Schulte eagerly testified in a very general way that the retail trade in New York City had decreased since United Cigar Stores Company began its operations there, and that ultimately all of the other retailers in the city would have to go out of business, upon cross-examination Mr. Schulte reluctantly conceded that he had been in the retail cigar business for fifteen years, that he had prospered, and that as a matter of fact he did not know whether the number of retail stores had decreased since 1901 in New York City, or that any retailers had ceased to do business (Schulte, Record, Vol. III, pp. 472–473). When United Cigar Stores Company commenced to operate in New York City, Mr. Schulte had five stores; at the time he was examined he had twelve in operation and was about to open several more in various places down town in New York City, as well as in Brooklyn, New York, and in Newark, New Jersey (Schulte, Record, Vol. III, pp. 472–474). Mr. Schulte also reluctantly named a number of other cigar dealers in New York City, the number of whose stores had materially increased since United Cigar Stores commenced to do business (Schulte, Record, Vol. III, p. 473).

(5) A time-worn misrepresentation concerning United Cigar Stores Company is to the effect that it has leased locations in which competitors had carried on successful retail establishments, and thereby had forced the retirement of such competitors. Mr. Schulte was evidently called by the Government to establish that fact. On his direct-examination he testified that he had been turned out of two locations in New York City in which he had conducted business, because United Cigar Stores Company had rented the location and then established its own business there (Schulte, Record, Vol. III, p. 465). The cross-examination, however, developed the fact that in both of these locations United Cigar Stores

Company had originally established a retail cigar business (no cigar business having been conducted in either place before that time), and that Mr. Schulte himself had succeeded in taking both of those locations away from it, by paying rent largely in excess of that paid by United Cigar Stores Company, and it was only after Mr. Schulte's leases on both of those locations had expired that United Cigar Stores Company again leased the premises and re-established the business which it had originated and conducted in those places (Schulte, Record, Vol. III, pp. 474–477). Mr. Schulte further testified that he had leased another location in which United Cigar Stores Company had established a business, thereby taking that lease away from it (Schulte, Record, Vol. III, p. 477), that in several instances he had opened stores on corners opposite to those in which United Cigar Stores Company had established a retail business, because he felt safe in coming there to do business in competion with United Cigar Stores Company (Schulte, Record, Vol. III, p. 478), and that he had made money in the retail cigar business (Schulte, Record, Vol. III, p. 478). There is not a word in the Record sustaining even by inference the charge that United Cigar Stores Company has driven one retailer out of business by leasing "over his head" any store that had theretofore been conducted and operated as a retail cigar store.

(6) Regarding the allegation that United Cigar Stores Company has at tremendous cost set up retail stores at prominent places in various cities, the Record shows quite the contrary; in fact, if we refer to the testimony of the Government's own witness, Mr. Schulte, we will see that United Cigar Stores Company never paid higher rent than was justified by the location, and that Mr. Schulte, in order to get those locations away from United Cigar Stores Company, paid rent far in excess of that

paid by it for the same location—in one case paying as rental $16,500 per year for a store in which United Cigar Stores Company had up to that time paid $9,500 per year (Schulte, Record, Vol. III, 476–477).

There is nothing in the laws of New Jersey, under which United Cigar Stores Company is incorporated, or in its charter, which prevents it from holding and acquiring the stock of sub-companies engaged in practically the same business. For all practical purposes, United Cigar Stores Company owns all of the stock of these sub-companies. The case is absolutely devoid of any evidence showing that there is any agreement of any kind between United Cigar Stores Company and any of its sub-companies, relating in any way to the handling, distribution or sale of tobacco products at retail or otherwise.

There never was any competition between the United Cigar Stores Company and any of these sub-companies, and there was therefore no competition to interfere with or to suppress. Neither were they organized and maintained to interfere with or to suppress competition with other retailers, nor in any sense directly or indirectly to interfere with the free flow of commerce between the States.

The operation of a chain of stores is not peculiar to United Cigar Stores Company (Cobb, Record, Vol. III, p. 77). There are a number of other chains of cigar stores throughout the United States, operated by other concerns, entirely disconnected with The American Tobacco Company, and each of these other concerns operates stores in number from two to sixty (Cobb, Record, Vol. III, p. 77). Some of these stores are controlled by other manufacturers. This condition existed before the United Cigar Stores Company began operations, and continued in increased numbers after the organization of this defendant and still so continues (Schulte, Vol. III, p. 473). The same condition exists in other lines of stores, such as chains of grocery stores, of shoe stores, of coffee

and tea stores, of drug stores, &c. (Cobb, Record, Vol. III, p. 78).

In *Anderson* v. *United States*, *171 U. S., 604*, *Mr. Justice Peckham* says, at page 615:

> " It has already been stated in the *Hopkins case*, above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several States, or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith* v. *Alabama*, 124, U. S., 465, 473: 'There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to certain kinds of agreements entered into between the persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise there is scarcely any agreement among men which has interstate or foreign commerce for

> its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void. We think, within the plain and obvious construction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this Court, we must hold the agreement under consideration in this suit to be valid."

The Record shows that the effect of the organization and development of United Cigar Stores Company has been, as claimed in its answer, to promote a more healthy state of competition in the retail cigar trade (Whelan, Record, Vol. III, pp. 119–120). This is accounted for by the fact that the United Cigar Stores Company advertises and exploits its goods more attractively; other dealers follow suit, advertise, make more effective window displays, arrange their stores more orderly, and thereby get more business. This is the fact not only in New York City but generally throughout the country, and has been carried so far as to make it appear that there are ten thousand United Cigar Stores in the country, because other retailers have adopted the methods introduced and maintained by United Cigar Stores Company in making their stores and their windows appear attractive and inviting to customers (Whelan, Record, Vol. III, p. 120).

What "powerful support" did the United Cigar Stores Company receive from the other defendants?

The American Tobacco Company did give financial support to this defendant. It invested monies in the enterprise. We have already pointed out that there is nothing unlawful in such investment (see *ante*, pp. 22 to 26).

The Record shows it received no other support whatever, unless it be contended that the allowances and discounts it received were such "support."

All that United Cigar Stores Company received by way of allowances from The American Tobacco Company was the same discount as that given to jobbers (Hill, Record, Vol. II, p. 234), and, when we remember that a large number of the jobbers are themselves retailers, it will be seen that this discount was not more than was received by a great many other retailers from The American Tobacco Company (Hill, Record, Vol. II, 404).

While it is true that United Cigar Stores Company is the only retail customer to whom the American Tobacco Company sells smoking tobaccos directly in New York City, it should be borne in mind that smoking tobaccos form a very small percentage of the merchandise handled and dealt in by United Cigar Stores Company (*ante*, p. 13). So far as plug tobacco is concerned (Dula, Record, Vol. II, p. 514), other retailers do receive a similar discount, and, so far as cigars are concerned, which form 70 per cent. of the business of United Cigar Stores Company, there are other retailers to whom this allowance is made by the American Cigar Company, which sells direct to everyone—wholesaler and retailer alike—who buys in quantities (Cobb, Record, Vol. III, p. 48). In fact, that the same allowances which are made to United Cigar Stores Company on its purchases from the American Tobacco Company, are made to other large retailers, because of the volume of their business, is shown directly by the evidence (Hill, Record, Vol. II, pp. 239 and 340). For a short time an allowance of ten per cent. on increased business was made by The American Tobacco Company to United Cigar Stores Company, and one of the purposes of this was to have United Cigar Stores Company discontinue asking for special allowances for special exploitations and for advertising. It was discontinued because naturally the United Cigar Stores Company, as did other customers, continued to ask for all of the discounts its officers thought they could obtain (Hill, Record, Vol. II, pp. 404–405). The American Tobacco Company

claimed that the allowances which it made to United Cigar Stores Company entitled it to preference in such advertising as would be obtained from window displays in the stores of United Cigar Stores Company (Hill, Record, Vol. III, p. 141). United Cigar Stores Company claimed that other manufacturers were willing to pay for these same privileges by way of making allowances to it, and that therefore The American Tobacco Company should likewise pay for these same privileges by making an allowance upon the goods purchased from it by United Cigar Stores Company (Hill, Record, Vol. III, p. 142). It was simply the result of the application of the familiar law of supply and demand. Mr. Whelan representing United Cigar Stores Company was in a position to demand payment for the privilege of the display of goods in the windows of the United Cigar Stores Company, and that privilege The American Tobacco Company paid for, because evidently it bid higher for the privilege than did other manufacturers. By this arrangement the Act was in no way offended. The opinion of the Circuit Court of Appeals in *Whitwell* vs. *Continental Tobacco Company* (125 Fed. R., 454) seems pertinent.

In *Whitwell* v. *Continental Tobacco Company*, *supra*, *Judge Sanborn* says, at page 458:

> "If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation."

And at page 460, he says:

> "The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can

> be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers."

In re Greene, 52 Fed. R., 104, at page 117, Circuit Judge Jackson said:

> "Upon certain conditions, which it was entirely optional with them to comply with or disregard, a rebate was promised by the seller. Such an arrangement does not amount to a contract to purchase exclusively from said distilling company or its distributing agents. But, suppose it did, there was nothing in such an agreement unlawful or in contravention of the statute. The promise of a rebate, as an inducement for exclusive trading, certainly does not constitute an 'attempt to monopolize,' when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements. * * * The purchasers were placed under no contractual or other restraint in respect to the price at which they should sell."

5th. *United Cigar Stores Company has not made any contract, nor has it engaged in any combination or conspiracy with the other defendants or any of them directly restraining interstate commerce so far as the public or consumers are concerned.*

The foregoing discussion in this brief demonstrates that the consumer of tobacco products was not directly or indirectly interfered with or affected by the operations of this defendant. There is absolutely nothing in the Record to show that

the supply of tobacco products to the consumers was at any time unduly restrained or unduly increased, nor that prices were ever raised or lowered in such a way as to affect the consumer. In fact, all of the ordinary elements of oppression so far as the consumer is concerned are absent from the case. No attempt was made by the Government to prove any such state of affairs, and our only reason for calling attention to the point is that one of the essential purposes of every combination in restraint of trade is to affect the consumer, and the entire absence of that element from this case is significant of the object and purposes of the defendants. No contract or combination was established, but if in the remotest degree any combination did exist, the object and purposes of that combination were essentially lawful (*Continental Wall Paper Co.* v. *Voight*, 148 Fed. Rep., 939, at p. 950; aff., 212 U. S., 227).

POINT II.

United Cigar Stores Company has not monopolized, nor attempted to monopolize, nor has it combined nor conspired with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations.

This question of monopoly may be viewed from two aspects:

1st. *United Cigar Stores Company has not secured nor attempted to secure a monopoly for any of the other defendants in tobacco products, nor combined with any of the other defendants for that*

purpose, i. e., to exclude others from the field of competition with the other defendants.

2nd. *United Cigar Stores Company has not secured nor attempted to secure a monopoly of the retail trade in tobacco products for itself, nor attempted so as to do either alone or acting in combination or in conspiracy with any of the other defendants, i. e., to exclude others from the field of competition with it.*

Regarding the first proposition, the petition charges (Rec., Vol. I., p. 59): "United Cigar Stores Company has been and is used by the other defendants as an instrument to acquire control of the retail tobacco business and to cripple other distributors of tobacco with the view of driving them out, destroying competition, and preventing others from entering."

It may also be urged that the other allegations of the petition which have been heretofore quoted in this brief in discussing combination and conspiracy, were intended also to charge United Cigar Stores Company with such combination and conspiracy with intent to procure a monopoly in tobacco products in interstate trade for the other defendants.

After reviewing the evidence concerning this feature of the case, the Circuit Court by Judge Coxe, said (Record Vol. I, p. 303–304):

> "It can not be assumed that a company which sells the products of all alike intends to secure a monopoly for one. * * * Eliminating the fact that the Tobacco Company has a large pecuniary interest in the stores company, there is absolutely nothing left upon which to base the charge of a conspiracy to restrain and monopolize trade.
>
> I cannot believe that the fact that a corporation, assuming it to have combined with others to restrain trade, invests its money in the business of another corporation engaged in selling its goods and those of others fairly to the public is of itself sufficient to convict

> the latter corporation of entering into a conspiracy to monopolize interstate commerce. * * * In short, the only circumstance which distinguishes the Stores company from other large dealers in the Tobacco Company's products is that a majority of its stock is owned by the latter, and, as we have seen, this is insufficient to convict it under the law."

What has been said in reviewing the facts as applied to the other allegations of the petition, concerning *combination* and *conspiracy*, applies with equal force here. (See *ante*, Point I, Subd. 3rd of this brief (pp. 27 to 31). The Record is barren of any evidence of any kind showing, or tending to show, in any way, any attempt on the part of the United Cigar Stores Company, directly or indirectly, to obtain or to attempt to obtain a monopoly, in whole or in part, of interstate commerce in tobacco products for any of the defendants, or to exclude other distributors of tobacco products from the field or to cripple them in any sense. There is no evidence that a single distributor was driven out or that a single one was prevented from entering the field. In fact, the Record shows the contrary (*ante*, p. 19). It seems therefore idle to recapitulate that evidence here. There is nothing in the evidence to show any attempt to exclude others—manufacturers, jobbers or retailers—from the business.

Intent is essential to an attempt to monopolize.

In *United States* v. *Knight*, the Chief Justice says, at page 17:

> "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."

In *Swift* v. *United States, supra, Mr. Justice Holmes*, writing the opinion of the Court, at page 396, says:

> "The Statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt."

In re Greene, 52 Fed. R., 104, Judge Jackson says, at pages 115–116:

> "But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns.
>
> A 'monopoly', in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. * * *
>
> It will be noticed that, in all the foregoing definitions of 'monopoly,' there is embraced two leading elements, viz., an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein. It was certainly not a 'monopoly,' in the legal sense of the term, for the accused or the Distilling & Cattle Feeding Company to own 70 distilleries, and the products thereof, whether

such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. * * * It does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so."

We note that this opinion of Circuit Judge Jackson was cited with approval and adopted by Mr. Justice White in the *Northern Securities case.* The Record shows a state of affairs like that in *Anderson* v. *United States, supra,* where *Mr. Justice Peckham,* at page 614, says:

> " A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction."

With equal force may it be said that a lessening of the amount of the trade in tobacco products was neither the necessary nor direct effect of the formation of United Cigar Stores Company nor of any combination between it and any of the other defendants; that, in truth, the amount of that trade has greatly increased since it was formed, and there is not the slightest evidence that the market prices—either wholesale or retail—of tobacco products have been lowered or increased or interfered with in any way by reason of its existence; there is no feature of monopoly in the whole transaction. Moreover, the

Record shows unequivocally that the sales of tobacco products manufactured by concerns other than the defendants increased greater proportionately in the stores of United Cigar Stores Company than they did in the stores of other retailers (Whelan, Record, Vol. III, p 115). The American Tobacco Company made no suggestions regarding the goods which should be sold in the stores of the United Cigar Stores Company. All that was desired was that United Cigar Stores Company should make money along legitimate lines (Whelan, Record, Vol. III, pp. 114–115; Duke, Record, Vol. IV, p. 415; see also *ante*, pp. 27–29).

In *Phillips* v. *Iola Portland Cement Co.*, *125 Fed. R.*, *593*, *Sanborn*, *C. J.*, at page 594 says:

> " It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This Act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states."

2nd. NO MONOPOLY HAS BEEN OBTAINED NOR ATTEMPTED TO BE OBTAINED OF THE RETAIL BUSINESS FOR THE UNITED CIGAR STORES COMPANY—NO ATTEMPT WAS MADE TO DESTROY OR UNJUSTLY TO HINDER COMPETITION WITH IT.

The petition in this regard charges that "United Cigar Stores Company is diligently seeking to monopolize the retail business in tobacco products" * * * that it "is seeking to acquire control of the retail business in tobacco products and thus render all competition with them more nearly impossible" and that "it is preventing others from entering" (Record, Vol. I, p. 59).

Again referring to the opinion of the Circuit Court as rendered by Judge Coxe (Record, Vol. I, pp. 302-303):

> "The company operates about 400 stores, scattered throughout the United States; but when it is realized that there are in this country over 600,000 places where tobacco is sold, the impossibility of monopolizing the retail trade by one who operates only six-tenths of 1 per cent. of these places will at once be apparent. * * * Neither is the fact that the business is conducted in a large number of stores important. * * * It is true that a part of the business thus built up would have been done by others had the company not been formed, but this is true of every large and successful business."

Reference is again made to the preceding pages of this brief for a discussion of the facts as disclosed by the Record, showing conclusively that no monopoly has resulted and no attempt to monopolize the retail trade in tobacco products has been made by or for United Cigar Stores Company (See *ante*, Point I, Subd. 4th of this brief.) Not only does the evidence show that no monopoly has been created or attempted to be created, but that

it has not been and is not now within the power of the defendants or any of them, to monopolize the retail trade in tobacco products or any part thereof. The Record wholly fails to establish any instance of the character condemned by *Mr. Justice Holmes in the Northern Securities* case, 193 U. S., 409, for nothing was done or attempted to be done with intent to exclude strangers to the alleged combination from competing with it in the particular business which it carries on. There was no attempt at any time to secure an exclusive right or privilege on the one side with a restriction or restraint on the other, which operated or tended to operate to prevent the exercise of a right or liberty open to the public. There was no attempt to secure or to acquire an exclusive right in the trade or commerce in tobacco products, by means which prevented or restrained others from engaging therein (*Re Greene*, 52 Fed., 116). The free flow of commerce between the States was not obstructed nor was any attempt made to obstruct it; the liberty of a trader to engage in business was not restricted nor was any attempt made to restrict such liberty.

Loewe v. *Lawlor, supra.*

The record is significantly barren of any evidence showing or tending to show that any effort was made to force any retailer to sell out or go out of business or to interfere with him in engaging in or attempting to engage in business.

POINT III.

This defendant has not, as an incident of obtaining a monopoly, or as part of any combination in restraint of trade, prevented vendors from engaging in the business of handling and dealing in tobacco products.

The petition in this regard charges as follows (Record, Vol. I, p. 59):

> "It has bought out very many dealers in and distributors of tobacco products and has taken agreements from the vendors not to engage in the business of selling the same."

The Circuit Court, passing upon this charge, in its opinion by Judge Coxe, held (Record, Vol. I, p. 304):

> "There were a few instances in which a business was purchased and, as the vendor was to continue in charge, a covenant was taken binding him not to engage in business in that locality on his own behalf. Such transactions are not forbidden. In the *Joint Traffic case* (171 U. S., 505), the Court says, at page 567:
>
> "'It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral

> to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business."

The Record shows that of the 405 stores operated by United Cigar Stores Company, only a very few were obtained by purchase from retailers who had theretofore been in the business (Whelan, Record, Vol. III, p. 99). Of those whose businesses were so purchased only in three or four instances was a covenant of any kind taken from the seller not to thereafter go into the retail tobacco business and in those cases the covenant was made only because the man was to continue with United Cigar Stores Company and it was desired that he should not at the same time be connected with any other business, and that the company should have the full benefit of his services (Whelan, Record, Vol. III, p. 122). As, has been heretofore pointed out, in other cases where the business of retailers was so purchased, the vendors subsequently went into business on their own account and were successful (*ante*, p. 34).

Covenants of this kind have been repeatedly reviewed by this Court and have been held not to be in violation of the Sherman Act (*U. S.* v. *Trans-Missouri Freight Ass'n*, *166 U. S., 290, at p. 329; U. S.* v. *Joint Traffic Ass., 171 U. S., 505, 567; Cincinnati Packet Co.* v. *Bay*, *200 U. S., 179*).

The covenants presented by the Record were the mere accompaniments of the sale of property; all that the vendors sold, besides certain instruments of competition, was the competition itself. The covenant was one of the conventional inducements of the purchase (*Cincinnati Packet Co. v. Bay*, 200 U. S., 179, at p. 184); such covenants were made as part of the sale of a business and not as a device to control commerce (*Cincinnati Packet Co. v. Bay*, 200 U. S., 179, at p. 185), and they are not within the letter or the spirit of the statute. The covenant in question is one of those instanced

as valid and enforcible by Circuit Judge Taft in *U. S.* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep., 271 (affd. 175 U. S., 211), at p. 281:

> "(1) By the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold;" * * *

In every case the covenant made by the vendor to United Cigar Stores Company met the requirements of the legal test as expressed by the same Judge.

> "Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary * * * to the enjoyment by the buyer of the property, good will, or interest in the partnership bought." * * *

POINT IV.

The decree of the Circuit Court dismissing the petition as to United Cigar Stores Company should be affirmed.

Respectfully submitted,

SOL. M. STROOCK,
Of Counsel for United Cigar
Stores Company,
Appellee.

October, 1909.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1909.

THE UNITED STATES OF AMERICA, Appellant, vs. THE AMERICAN TOBACCO COMPANY and others.	316.
THE AMERICAN TOBACCO COMPANY and others, Appellants, vs. THE UNITED STATES OF AMERICA.	317.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE R. P. RICHARDSON, JR., & COMPANY, INC.

The appellee R. P. Richardson, Jr., & Company, Inc., is satisfied with the practical results of the

decision of the Circuit Court in this matter, and, therefore, has not appealed. This appellee is seeking to separate itself from all connection with The American Tobacco Company, and the injunction provided for in the decree below practically accomplishes this purpose, although this respondent would prefer that the injunction be made broad enough to prohibit The American Tobacco Company from receiving dividends or other income from it.

Position of this Appellee.

This appellee has for many years, through itself and its predecessor, R. P. Richardson, Jr., & Company, a partnership, been engaged in the business of manufacturing and selling smoking tobacco, with its headquarters at Reidsville, in the State of North Carolina. Its principal brand of smoking tobacco is known as "Old North State," and this brand has acquired a wide reputation and become a household word in a number of States. This appellee's goods have, ever since the organization of The American Tobacco Company, come in direct competition with its "Bull Durham" brand, as well as with some other well-known brands of that Company, so much so that The American Tobacco Company some years ago entered into a vigorous campaign against the "Old North State" brand, and by various means, such as extensive advertising, distribution of premiums and extra packages of goods to dealers, house-to-house canvassing, etc., attempted to force it out of business. This campaign had progressed to a state where the R. P. Richardson, Jr., Company's officers saw ruin staring them in the face, when a communication was received from an official of The American Tobacco Company in New York, asking R. P. Richardson, Jr., its President, to come to New York for a conference. Mr. Richardson thought it best to meet the officials of The American Tobacco Company, and find out what they wanted, and he therefore came to New York and met its principal officers, among

them Mr. Duke, Mr. Hill and Mr. Cobb. After a conference at which various matters connected with the fight then going on were discussed, Mr. Richardson told these officials that under the circumstances he felt that it was best for the Company to sell out its business to The American Tobacco Company and to retire from the field. They told him that this was not what they wanted, that they would like to secure a controlling interest in Mr. Richardson's Company and to have him remain in control and with his other officers go on with the business the same as before; that The American Tobacco Company would assist the Richardson Company in every way in its power and that the stockholders of the Richardson Company would thus be enabled to make more money out of their interest in the company than they had theretofore made when they owned the entire stock. Some discussion as to the details of such arrangement was had and Mr. Richardson returned to Reidsville, North Carolina, the headquarters of his company, and of his own place of residence, and there conferred with the other officers and stockholders thereof, and they all made up their minds that they had but one choice, and that was between the arrangement offered by The American Tobacco Company on the one hand and the certainty of ultimately being driven to the wall and suffering financial ruin on the other. They felt that there was no use in continuing their fight with this powerful monopoly, and concluded that if they were allowed to go ahead with their business under the arrangements suggested by The American Tobacco Company and unhampered by them, they could not only keep the business which they had already acquired, but would be in a position to greatly increase the same. They therefore sent word signifying their acceptance of the proposition made by the officials of The American Tobacco Company, and papers were perpared by counsel and the proposed arrangement

consummated. Under the terms thereof the controlling interest in the common and voting stock of the R. P. Richardson Company was to be turned over to The American Tobacco Company; but this stock was not to be transferred to The American Tobacco Company on the books, but was to remain in the name of R. P. Richardson, Jr. It will be noted that the R. P. Richardson, Jr., Company was not a party to the contract made for the purpose of carrying out this arrangement, but that the same was executed by The American Tobacco Company and by R. P. Richardson, Jr., Edward E. Richardson and Edward R. Walters, individually. The R. P. Richardson Company people were perfectly innocent in everything connected with this transaction, and there was nothing illegal or improper contemplated by them in or connected with the arrangement. They had been assured that they would be allowed to continue their business in the same manner as before and unhampered and practically uncontrolled by The American Tobacco Company, and that the fierce and unfair competition theretofore existing would immediately cease. Great was their disappointment when they found, soon after the commencement of the new relations, that The American Tobacco Company people objected to their pushing their trade into new territory and directed them to use their business in certain quarters against independent competitors in practically the same manner as theretofore practiced by The American Tobacco Company against themselves; but the Richardson people absolutely refused to carry on any such unfair competition and insisted upon managing their company without interference, and pushing their business in the manner formerly pursued by them and without control or dictation on the part of The American Tobacco Company, or its allied interests. Very naturally, strained relations soon arose between the Richardson people and The American Tobacco Com-

pany, and the Richardson Company and the individuals who signed the contract with The American Tobacco Company shortly thereafter commenced an action in the courts of the State of North Carolina seeking to set aside the contracts and arrangements between and among the two companies and said individuals, on the ground of fraud, duress and misrepresentations, and to allow the Richardson Company to return to The American Tobacco Company the moneys which it had advanced for the purpose of acquiring its interests in the Richardson Company, and also to allow the Richardson Company to resume its former situation free from all control or relations with The American Tobacco Company. Thereupon The American Tobacco Company demanded that the common stock to which it was entitled under the terms of its agreement with said individuals should be transferred to it on the books of the Richardson Company, and took other steps clearly showing its intention to assume absolute control of the Richardson Company, its policies and business. The Richardson Company and said individuals who signed said agreement promptly and absolutely refused to transfer this stock or to cause its transfer, but offered to repay all moneys which had been advanced on the part of The American Tobacco Company and to cancel the said agreement and all contracts and agreements between these companies, but The American Tobacco Company insisted upon retaining its interests in the Richardson Company, and soon thereafter started a suit in the Court of Chancery of New Jersey, under the laws of which State the Richardson Company was incorporated, to compel the Richardson Company and said individuals to transfer and cause to be transferred, the said controlling interest in this stock to The American Tobacco Company, or its appointees, and to allow it to assume control thereof under the terms of the said agreement, and in connection therewith procured an injunction in the said Court of Chancery of New Jersey pre-

venting the further prosecution of the said North Carolina suit. The Richardson Company and said individuals have interposed a cross-bill in this New Jersey suit praying that the said alleged agreements between it and The American Tobacco Company may be declared illegal and void, for the reasons set out in the North Carolina action, and that it may be restored to its former independent position free from all interference by The American Tobacco Company. This suit has been partly tried, but has been adjourned pending the decision of these appeals by the Supreme Court of the United States. The Richardson Company has at all times vigorously maintained its independence and pursued its business as an independent company in the same manner as before this agreement was entered into. It has not sought to take unfair advantage of The American Tobacco Company, but has offered and tendered the return of all moneys advanced. These moneys are secured by bonds of the Richardson Company which are held by The American Tobacco Company, and interest has been regularly paid thereon from the moment such moneys were advanced and up to the present time.

The facts regarding the relations between this appellee and The American Tobacco Company are set out in the answer of the Richardson Company herein (See Record, Vol. I, p 265; see also testimony of witness Henry N. Stone, Record, Vol. III, pp. 656 to 676, and Percival S. Hill, Record, Vol. IV, p. 690). The facts contained in said answer have not been disproved or controverted by any of the parties to this proceeding, and they, therefore, stand admitted.

THIS APPELLEE RESPECTFULLY URGES THE ATTENTION OF THIS COURT TO THE FOLLOWING POINTS:

The legal questions involved in these appeals and the authorities bearing upon them have been fully and ably presented by the learned counsel for The

United States, and we feel that there is really nothing that we can add to the points contained in the Government's brief so far as these questions are concerned, but this appellee earnestly desires that the prayer of the Government in this proceeding shall be sustained and granted, and that the so-called "Tobacco Trust" may be dissolved, the effect of which will be to prevent The American Tobacco Company from controlling or interfering with this appellee, thus practically allowing the Richardson Company to resume its former position as an independent concern and permitting it to persue its business and manage its affairs in the same manner as it did prior to the arrangement above mentioned, and without any control or interference on the part of The American Tobacco Company, other than the usual fair competition carried on between independent interests engaged in the same line of business.

This appellee insists that it stands entirely innocent as to all of the illegal transactions and matters which have been proven or claimed in this proceeding. It has never taken part in any such transactions, and has always strenuously opposed being compelled by The American Tobacco Company to aid or assist in any scheme of unfair competition or illegal combination. Both it and its predecessor, R. P. Richardson, Jr., & Company, a partnership, have always pursued a legitimate business in a fair and proper manner, and have never taken part in any unlawful scheme to undermine a competitor or drive it out of business.

We respectfully urge that the testimony and record in this proceeding conclusively show that The American Tobacco Company is an illegal combination in restraint of trade, and a monopoly in the strongest sense of the term, but we insist that the contention of the Government for a receivership should not be sustained so far as this appellee is concerned. The American Tobacco Company should be enjoined from all control over or inter-

ference with this appellee, thus allowing the Richardson Company to resume and continue its independent existence. A receivership, so far as this appellee is concerned, will cause great hardship to it and to its innocent stockholders, and can serve no good purpose. Everything contended for in this proceeding on the part of the Government can be decreed and carried out, so far as the Richardson Company is concerned, by simply affirming the decree of the Court below, and without the need of a receivership. The practical effect of such a decree is to divorce this appellee from the combination known as The American Tobacco Company, and to allow it to preserve and continue its independence, and this is all that the Government can rightfully ask in the case of an innocent party, such as the Richardson Company has shown itself to be.

We respectfully submit that the decree of the Circuit Court should be affirmed; and that no modification of such decree shall be had which will in any manner allow The American Tobacco Company to control or interfere with this appellee.

CHARLES R. CARRUTH,
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C. B. WATSON,
JAMES T. MOREHEAD,
Of Counsel for Appellee R. P. Richardson, Jr., & Company, Inc.

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IN THE

Supreme Court of the United States.

316.

THE UNITED STATES OF AMERICA,
Petitioner-Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Defendants-Appellees.

317.

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Appellants,

against

THE UNITED STATES OF AMERICA,
Appellee.

CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND ARGUMENT FOR THE DEFENDANT THE AMERICAN TOBACCO COMPANY AND CERTAIN OTHER DEFENDANTS-APPELLEES IN THE FIRST OF SAID APPEALS AND APPELLANTS IN THE SECOND.

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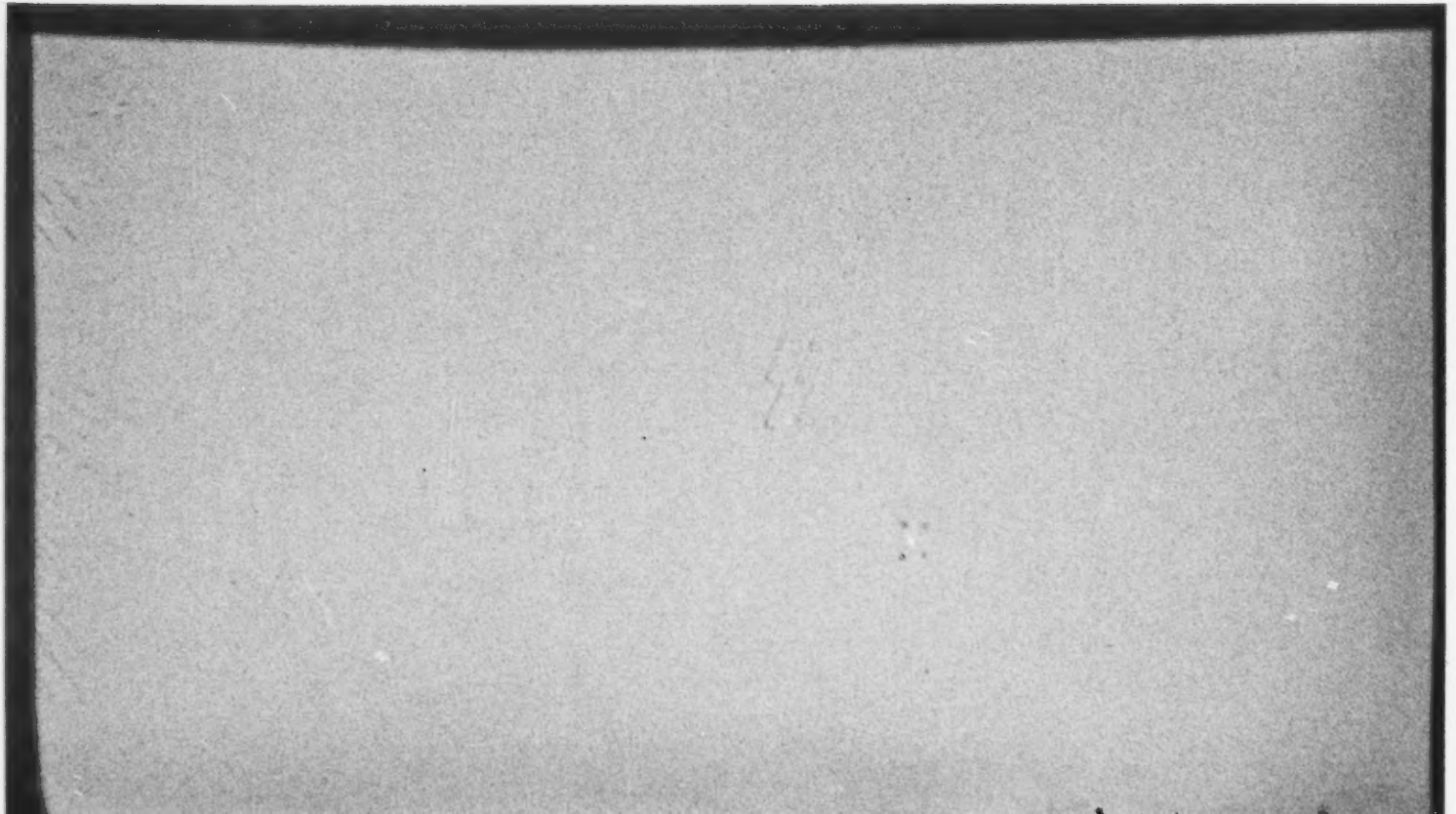

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IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Petitioner-Appellant, AGAINST THE AMERICAN TOBACCO COMPANY and others, Defendants-Appellees.	316
THE AMERICAN TOBACCO COMPANY and others, Appellants, AGAINST THE UNITED STATES OF AMERICA, Appellee.	317

CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief and Argument for the Defendant The American Tobacco Company and Certain Other Defendants-Appellees in the First of Said Appeals and Appellants in the Second.

Statement of Case on Appeal.

These are appeals from a decree rendered by the United States Circuit Court for the Southern District of New York. The case was heard by the four Circuit Judges of the Second Circuit in accordance with the Act of Congress approved February 11, 1903 to expedite the hearing and determination of suits in equity arising under the Sherman Anti-Trust Law. A final decree was entered on December 15, 1908 (a), granting in part the relief asked by the Government, the plaintiff, and awarding an injunction against The American Tobacco Company and certain other defendants. The Petition was dismissed as to certain of the defendants.

All of the defendants against whom relief was granted have joined in this appeal (except R. P. Richardson, Jr. & Co., Inc.); the Government has appealed from so much of the decree as dismissed the Petition as to certain of the defendants, and also because, as contended by the Government, the relief granted against the other defendants as to whom the Petition was not dismissed, was not sufficient. By virtue of these cross appeals all of the original parties to the suit are in this appeal, either as appellants or appellees, or in both capacities.

This brief and argument is filed in behalf of all the defendants except the defendants The Imperial Tobacco Company (of Great Britain & Ireland), Ltd., United Cigar Stores Company, R. P. Richardson, Jr. & Co., Inc., and Welford C. Reed, which four defendants are represented by other solicitors and counsel.

All four of the circuit court judges who participated in the hearing of the case delivered opinions (b). The effect of these opinions is that Judges

(a) Record, Vol. 1, p. 329.
(b) Record, Vol. 1, pp. 291-328.

Lacombe, Coxe and Noyes agree that the corporation defendants (except The Imperial Tobacco Company, Ltd., British-American Tobacco Company, Limited, W. S. Mathews & Sons, T. C. Williams Company, David Dunlop, Inc., and United Cigar Stores Company) are themselves combinations, or have entered into combinations, in restraint of trade and commerce among the several States and with foreign nations, in leaf tobacco, the products manufactured therefrom and articles necessary and useful in connection therewith. Circuit Judge Ward dissented upon the opinion that the Petition should be dismissed as to all the defendants.

The Record is very voluminous, and upon a consideration of it there is no dissent from the conclusion stated separately by Circuit Judges Lacombe, Noyes and Ward, in substance that the conduct of defendants has not involved injury to the public or any part thereof. This conclusion is stated by Circuit Judge Lacombe in detail as follows:

> "The record in this case does not indicate that there has been any increase in the price of tobacco products to the consumer. There is an absence of persuasive evidence that by unfair competition or improper practices independent dealers have been dragooned into giving up their individual enterprises and selling out to the principal defendant . . . During the existence of The American Tobacco Company, new enterprises have been started—some with small capital in competition with it and have thriven. The price of leaf tobacco—the raw material—except for one brief period of abnormal conditions, has steadily increased until it has nearly doubled, while at the same time 150,000 additional acres have been devoted to tobacco crops and the consumption of the leaf has greatly increased. Through the enterprise of defendant, and at large expense, new markets for American

> tobacco have been opened or developed in India, China and elsewhere."

The decree of the Court, so far as it was against the defendants, was based upon transactions with respect to which there was no contest made in the pleadings—indeed, transactions which have been for years publicly known—and is expressed by Circuit Judge Lacombe in this language, immediately following his statement of exoneration of the defendants from any charges that they had pursued methods oppressive to purchasers of their products, producers of their raw material, or competitors in trade:

> "But all this is immaterial; each one of these purchases of existing concerns complained of in the Petition was a contract and combination in restraint of the competition existing when it was entered into and that is sufficient to bring it within the ban of this drastic statute."

The decree declares that each of the five defendants, The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company and MacAndrews & Forbes Company "constitutes and is itself a combination" in violation of the Act of Congress, and enjoins each of them from engaging in interstate commerce in tobacco or its products, with leave to them to apply for a modification, suspension or dissolution of the injunction upon affirmatively showing the restoration of "reasonably competitive conditions"; it enjoined The American Tobacco Company, American Snuff Company, American Cigar Company, P. Lorillard Company, R. J. Reynolds Tobacco Company, Blackwell's Durham Tobacco Company and Conley Foil Company from voting stock in companies in which they respectively own stock, or in any way attempting to exercise control or influence in such companies. Among these

companies in which the various stockholding companies are forbidden to vote their stock, or otherwise exercise influence, are included companies manufacturing tobacco, snuff and cigars; companies engaged in marketing these products; and companies which supply materials used in the manufacture of tobacco and its products.

The Government filed assignments of error (a) and the defendants-appellants filed assignments of error (b) which, taken together, unquestionably bring for review by this Court the whole case. It is therefore thought unnecessary and undesirable to frame this brief and argument on any theory which involves the calling attention to particular errors by the Circuit Court.

Pleadings.

The pleadings consist of the petition (c), and answers filed for all the defendants (d). These pleadings are very voluminous. Voluminous testimony has been taken on the part of the Government and the defendants. In view of the discussion of facts that will be necessary, in any event, there would be involved an unnecessary repetition, and an unnecessary prolongation of this brief and argument, to epitomize the pleadings.

There are sixty-five corporation defendants, and twenty-nine individual defendants. The petition alleges that they are all in a combination in restraint of trade and commerce among the United States and with foreign nations, and that they are monopolizing and attempting to monopolize such trade and

(a) Record, Vol. 1, p. 338.

(b) Record, Vol. 1, p. 348.

(c) Record, Vol. I., p. 1.

(d) Record, Vol. I., p. 174 (Imp. Tob. Co.); Vol. I., p. 184 (W. C. Reed); Vol. I., p. 190 (U. S. Cigar Stores Co.); Vol. I., p. 198 (Brit. Am. Tob. Co.); Vol. I., p. 204 (Am. Tob. Co. and others); Vol. I., p. 265 (Richardson Co.).

commerce, and in its prayers for relief, after praying that certain specified written contracts be annulled, and that certain corporations existing under the laws of foreign countries be enjoined from engaging in interstate or foreign trade and commerce within the jurisdiction of the United States, the petition prays further:

> "That the Court adjudge The American Tobacco Company, the American Snuff Company, The American Cigar Company, the American Stogie Company, the MacAndrews & Forbes Company, and The Conley Foil Company is each a combination in restraint of interstate and foreign trade and commerce; and that each has attempted and is attempting to monopolize, is in combination and conspiracy with other persons and corporations to monopolize, and has monopolized part of the trade and commerce among the several States and with foreign nations; and order and decree that each one of them be restrained from engaging in interstate or foreign commerce, or, if the Court should be of opinion that the public interests will be better subserved thereby, that receivers be appointed to take possession of all the property, assets, business, and affairs of said defendants and wind up the same, and otherwise take such course in regard thereto as will bring about conditions in trade and commerce among the States and with foreign nations in harmony with law.
>
> "That the holding of stock by one of the defendant corporations in another under the circumstances shown be declared illegal and that each of them be enjoined from continuing to hold or own such shares in another and from exercising any right in connection therewith.
>
> "That defendants, each and all, be enjoined from continuing to carry out the purposes of the above described contracts, combinations, conspiracies, and attempts to monopolize by the means herein described, or by any other, and be required to desist and withdraw from all connection with the same.

"That each of the defendants be enjoined from purchasing leaf tobacco or from selling and distributing its manufactured output as a part of interstate and foreign trade and commerce in conjunction or combination with any other defendant, and from taking part or being interested in any agreement or combination intended to destroy competition among them in reference to such purchases or sales."

The answers of the defendants are in detail, and fully deny all restraints of trade, monopolization or attempts to monopolize. Many of the allegations of the petition, such as allegations of acquisitions of property, of ownership of stock, dates of transactions and amounts of purchase prices, are admitted, but the *innuendo* of the petition, and allegations as to purposes and effects of the various transactions are specifically denied; and the answers make affirmative allegations with respect to such transactions as are alleged and admitted, with a view of showing that the purpose and effect of such admitted transactions were not to restrain or monopolize interstate or foreign trade and commerce.

Facts.

An attempt will be made here to fairly epitomize the facts shown by the testimony and exhibits, and in order to make such epitome as clear as practicable, such facts will be stated under the following heads:

I.—The general nature of the business of growing, manufacturing and selling tobacco and the products of tobacco.

II.—The various transactions testified to, substantially in their chronological order, as follows:

(*a.*) Concerning business of the American Tobacco Company, as well as the merging companies that formed it, to wit, the

American Tobacco Company, Continental Tobacco Company and Consolidated Tobacco Company.

(*b.*) Concerning business of American Snuff Company and its predecessors.

(*c.*) Concerning business of American Cigar Company and its predecessors.

(*d.*) Concerning business of American Stogie Company.

(*e.*) Companies which furnish supplies to, or buy supplies for, other defendants.

(*f.*) English business and affairs of British-American Tobacco Company, Limited, including English contracts.

III.—Special features emphasized by the Government, or by the defendants, to wit:

(*a.*) Concerted or independent action in purchase of leaf.

(*b.*) Ownership of stock in other companies by certain of the defendants, as distinguished from direct ownership of property.

(*c.*) Methods of competition practiced by defendants.

(*d.*) Covenants not to re-engage in business.

I.—THE GENERAL NATURE OF THE BUSINESS OF GROWING, MANUFACTURING AND SELLING TOBACCO AND THE PRODUCTS OF TOBACCO.

Tobacco grows in various sections of the United States. It is not the same product throughout its growth, but its various types and kinds are related products. The crop varies from 700,000,000 pounds to 1,000,000,000 pounds (a).

The manufactured product is classified by the internal revenue department as follows: Cigars, Little Cigars, Cigarettes, Smoking Tobacco, Plug and

(a) Record, Vol. V, Gov't Ex. No. 76.

Twist Tobacco, Fine Cut Tobacco, Snuff. Cigars, as distinguished from Little Cigars, include all rolls of tobacco weighing more than three pounds to the thousand; Cigarettes are divided into two classes, those weighing more than three pounds to the thousand and those weighing less, and they are distinguished from Cigars and Little Cigars in that they are covered with a wrapper, usually paper, but always of some substance other than tobacco; Smoking Tobacco is all tobacco that is put up in individual consumer's packages and includes a great deal of tobacco that is chewed; Plug and Twist Tobacco includes all tobacco put into those shapes—uncut tobacco—generally packed into large wooden boxes from which the tobacco itself is delivered to consumers; and Snuff includes not only the snuff that is capable of being "snuffed," but includes also the snuff that is taken into the mouth and is hardly distinguishable from chewing tobacco (a).

Tobacco and the products of tobacco being luxuries are subject to a tax levied by the General Government and contribute largely to its revenue. By internal revenue statute and custom tobacco goes to the consumer in small parcels; he buys an ounce package, or a package of an ounce and two-thirds, or two ounces, two and one-half ounces, or three and one-third ounces, or four ounces. All of these are prescribed statutory packages, so far as smoking tobacco and fine cut are concerned. These statutory regulations do not apply to plug and twist tobacco, but they by custom go to the consumer in small pieces—one sixth, one fifth, one-fourth, or some other fraction of a pound. Regulations with respect to snuff are the same as with respect to smoking tobacco. In cigarettes there are statutory packages of ten, twenty, fifty or one hundred. In cigars the packages are twelve, twenty-five, fifty, one hundred, and two hundred and fifty, but cigars are also sold singly to consumers.

(a) Record, Vol. IV, pp. 516, 517.

To be considered in the marketing of tobacco, besides these small statutory packages, is the coinage system of the country. The five-cent piece and the ten-cent piece are common coins, but there is no four-cent piece nor seven nor eight-cent piece.

So the manufacturer of tobacco has to adjust his packages to conform to the statutes and custom, and adjust his prices to conform to the customary currency. He has still another element to consider, to wit, that his product is a luxury and has its success by appealing to the taste of many consumers. Men may be argued with as to the steel they will put into their buildings, or the coal they will put into their furnaces, or the oil they will put into their lamps, or even the clothes they will wear, but argument cuts no figure with respect to the tobacco they will chew or smoke. If it pleases it is well, and if it does not please it is not well, and that is the end of the matter.

The raw material and the essential material for all the products of tobacco is leaf tobacco. It grows substantially all over the world. Perhaps the highest priced product is grown in Cuba or Turkey (a). Its growing has never been attempted by manufacturers of tobacco, in this country at least, but has been left in the hands of farmers, owners or renters of the land. These farmers grow the tobaccos to which their soil is suitable, and they grow likewise other crops, and one of the questions that is to be considered in this case is the effect of the growth and success of the defendant companies on this industry.

The leaf tobacco thus grown in various sections is bought by manufacturers and taken into their factories. There are differences in the leaf, and the leaf is subjected to different processes of manufacture; some of the leaf is rolled, without flavoring or addition of any substance, into cigars or cigarettes; some of it

(a) Record, Vol. II., p. 79.

is flavored with various substances for chewing tobacco; some for smoking tobacco; and some for snuff. These processes of manufacture are kept secret. The blending of the tobaccos, the use of crops grown on some lands in combination with crops grown on others, the proportion of flavoring material, the method of manipulation, are all processes of manufacture that each manufacturer for himself adopts or devises.

Having manufactured his product, the manufacturer must market it, and to that end he must in some way get his product to the consumers of tobacco; they are scattered all over the world; they buy from the ordinary retail merchant; they are not required by any necessity to have a given amount of tobacco, but their requirements are measured by their wishes from day to day. Retail merchants are ordinarily supplied by wholesale merchants who have in the nature of things individual knowledge of the credits and resources of their customers.

The problem then for a tobacco manufacturer is, in the first place, to secure an adequate and proper supply of his raw material; in the second place to subject it to processes of manufacture that will meet the tastes of a large number of consumers; and, in the third place, to get it to those consumers in a way in which they are ordinarily served. In all of this the manufacturer must have regard to the essentials heretofore noted; in the first place, he must conform to the statutes and regulations provided by the Government in its collection of internal revenue; in the second place, he must realize that consumers will buy his product only casually, and in the ordinary course of trade and that they will use the coins that are in ordinary use; and, in the third place, he must realize that he is simply trying to please men's tastes, and that men, when they are pleased, will ask again for the product that pleases them, but that

men when they are not pleased will listen to no argument as to the superiority of goods which fail to please them.

II.—THE VARIOUS TRANSACTIONS TESTIFIED TO, SUBSTANTIALLY IN THEIR CHRONOLOGICAL ORDER, AS FOLLOWS:

(*a.*) *Directly concerning the business of The American Tobacco Company, etc.*

Before 1890 all of the foregoing was true, and, throughout the States—principally where tobacco was grown—there existed manipulators and manufacturers of tobacco. Among the tobacco manufacturers there were five leading manufacturers of smoking tobacco and cigarettes. They had been in active competition involving enormous advertising expenses—one of these concerns, W. Duke Sons & Company, of Durham, N. C., spending in 1889 $800,000 in advertising, or twenty per cent. of its receipts (a). In 1890 a company was formed called "The American Tobacco Company," and it acquired the factories of these five concerns, issuing to the owners of these factories—whether stockholders or members of partnerships—stock.

The American Tobacco Company was organized with a capital stock of $25,000,000. Its stock was issued for property—the manufacturing plants of the said five concerns—from which it immediately received an adequate return. During its first year of operation it paid a dividend of eight per cent. on its preferred stock and a dividend of ten per cent. on its common stock (b). Its business was largely a cigarette business, but it had a substantial smoking tobacco business as well.

The absence of motives usually deemed injurious to the public, or contrary to law, in the organization of The American Tobacco Company is shown

(a) Record, Vol. IV, p. 340.
(b) Record, Vol. IV, p. 341.

in the testimony of James B. Duke, one of its organizers and its president up to 1904, when it ceased to exist, having been merged into the present The American Tobacco Company. His testimony is not in this, nor really in any particular, in any way contradicted.

> Q. Was it your purpose and motive in entering into the organization of the American Tobacco Co. and selling out to it, to reduce the price of leaf tobacco by eliminating the competition of those concerns?
>
> A. It was not.
>
> Q. Was it your idea in entering into the organization of the American Tobacco Co. and selling your business out to it to advance the prices at which the manufactured product would sell by the elimination of competition?
>
> A. No, sir; we were getting all the price we wanted to get for the goods because they had to be sold to the consumer and our prices had ranged all the way from $3.60 to $3.80 a thousand, the different manufactures.
>
> Q. That was before the formation of the American Tobacco Company?
>
> A. Yes, we reduced the price.
>
> Q. What happened to the price of leaf; did you reduce the price of that, too?
>
> A. The price of leaf to the manufacturer that was bought from speculators was reduced because we went and bought our tobacco direct on the warehouse floor at auction from the farmers.
>
> Q. How about the price for leaf that the farmer get?
>
> A. The price that the farmer got I think averaged more because it largely eliminated the speculator who had been theretofore buying and selling to the manufacturers, with the exception of Duke Sons & Co. We had been buying a good part of our tobacco in the loose warehouses direct from the farmer; he was having his tobacco sold at auction (a).

The American Tobacco Company was not formed, either, as the first step in a design to monopolize the

(a) Record, Vol. IV, pp. 339, 340.

tobacco business. It was not in the contemplation of the parties that formed The American Tobacco Company that it should purchase other businesses at all (a).

Popular prejudice was already to some extent showing itself against cigarettes and it behooved the managers of the business to reasonably protect their investment against destruction by the spread of this prejudice. During the first two years after its organization The American Tobacco Company acquired the manufacturing plants of the National Tobacco Works, of Louisville, Kentucky, a plug manufacturer; Marburg Brothers, of Baltimore, Md., a manufacturer of smoking tobacco; G. W. Gail & Ax, of Baltimore, Md., manufacturers of smoking tobacco and snuff, and P. Whitlock, of Richmond, Va., manufacturers of cheroots. These purchases were all simply purchases of manufacturing businesses; they operated to make broader the basis upon which The American Tobacco Company was built and its securities issued (b).

In 1892 there appeared on the market a cigarette made without paste, but by crimping of the paper—it was made on a machine called "The Decoufle" and the rights to this machine were owned by a firm in New Orleans named "Hernsheim Brothers." This concern owned a cigar factory and a tobacco and cigarette factory. The American Tobacco Company entered into negotiations and bought its cigarette factory with the machine rights (c).

The American Tobacco Company concluded to still further broaden its lines and to go into the manufacture of the all-tobacco cigarettes, or little cigars, which were not under the condemnation of State anti-cigarette statutes, and which were exempt, to at least an extent from the prevailing sentiment against cigarettes. It made three acquisitions of factories and plants in

(a) Record, Vol. IV, p. 341.
(b) Record, Vol. IV, pp. 341, 342.
(c) Record, Vol. IV, p. 345.

order to go into this business—the Consolidated Cigarette Company, T. H. Hall & Company and Herman Ellis & Company (a).

By this time The American Tobacco Company had become one of the large manufacturers of the products of tobacco—but not cigars—and its securities were held and dealt in by the general public. It was the vendee to which many prospective vendors of tobacco businesses naturally turned, and so, between 1893 and 1899, it acquired for investment several tobacco factories—the factories of Myer Tobacco Company, a company which manufactured long cut tobacco, sold principally in New York, the Butler Tobacco Company, The American Eagle Tobacco Company, and possibly others thus passed into its possession.

The American Tobacco Company by its purchases during these years, and by the progress of its business, had become not only a large manufacturer of cigarettes and smoking tobacco, but a large manufacturer of plug tobacco as well. The American Tobacco Company in 1895 was manufacturing a brand of plug tobacco which had a large sale in the City of Philadelphia; the Drummond Tobacco Company was a large manufacturer of plug tobacco with a sale in St. Louis and throughout the middle west; the Drummond Tobacco Company reduced the price on one of its brands on sale in Philadelphia, and in keen competition with a brand of The American Tobacco Company; thus was inaugurated a war in plug tobacco prices, because The American Tobacco Company immediately retaliated with a cut in price on its tobacco sold in the middle west. This was the "Battle Ax" or "Plug" war, to which reference is frequently made in this litigation. "Battle Ax" tobacco so sold by The American Tobacco Company at a cut price became popular and it was sold throughout the country from 1896 to 1899 (b).

(a) Record, Vol. IV, p. 347.
(b) Record, Vol. IV, p. 350.

In 1898 a proposition was made to The American Tobacco Company that it should buy a number of plug factories, which proposition was declined (a). Afterwards, one Ray, and one Hughes, who had first proposed to sell to The American Tobacco Company, promoted a prospective company to buy out several large plug manufacturers and they proposed to organize a corporation with a capital stock of $75,000,000. They proposed that such company purchase the plug manufactories of The American Tobacco Company at between $20,000,000 and $30,000,000. The American Tobacco Company agreed to sell at that price. It is to be noted that The American Tobacco Company under this proposition would not have held a majority, nor substantially a majority, of the stock of the plug company and could not have controlled that company; it was willing to sell its plug business, taking a minority interest in the company that bought it (b).

This proposed organization failed, and The American Tobacco Company thereafter acquired the plug factories of the Brown Tobacco Company and the Drummond Tobacco Company (c). Renewed negotiations were begun for the formation of a plug manufacturing company, and they ultimately resulted in the formation of Continental Tobacco Company, not by the procurance of The American Tobacco Company, but through the efforts of promoters. The American Tobacco Company sold to that company so formed its plug tobacco factories, with their brands and good-will, and took its pay in securities of the company. It was not the purpose of The American Tobacco Company to control this newly-formed plug company; it was not the purpose of its president to become the president of such plug company. Mr. Duke, the president of the American Tobacco Company, did become the president of the Continental Tobacco Company, but it was not in

(a) Record, Vol. IV, p. 352.
(b) Record, Vol. IV, p. 353.
(c) Record, Vol. IV, p. 352.

the contemplation of any of the parties that he should do so (a). Neither at the organization of Continental Tobacco Company nor at any time thereafter did The American Tobacco Company own a majority of its stock (b).

Continental Tobacco Company was originally a plug tobacco manufacturer and The American Tobacco Company was a smoking tobacco and cigarette manufacturer; after 1898, from time to time each concern bought factories, some of which manufactured various lines; and so each concern found itself manufacturing other lines than those originally manufactured by it. In 1904, however, Continental Tobacco Company sold to The American Tobacco Company at a fair price, all of its "cut tobacco" manufacturing plants with their brands and good-will, and from that time until the Merger (hereinafter to be mentioned) Continental Tobacco Company was engaged in the manufacture of plug and twist tobacco only, and The American Tobacco Company manufactured only "cut" tobacco—called by the Internal Revenue Department "smoking tobacco," cigarettes and little cigars (c).

The American Tobacco Company never owned a majority of the stock of Continental Tobacco Company. Its stocks and the stocks of Continental Tobacco Company were dealt in on the exchanges and had many holders. Naturally the two stocks drifted largely into the same hands. The investor who had held the American Tobacco Company stocks became a holder of the stock of Continental Tobacco Company; he had come to know something of tobacco securities and to have confidence in them. In 1901 there was very evident a need for larger working capital on the part of these companies, unless they were to stand still or suffer a retrogression.

(a) Record, Vol. IV, p. 357.
(b) Record, Vol. IV, p. 357.
(c) Record, Vol. IV, p. 429.

Changes in tariff and trade conditions had made it necessary to embark in the manufacture of tobacco in England, or give up the English market (a); and the two companies had co-operated in the organization of American Cigar Company in January, 1901, and through that company were investing in the cigar business. Methods of raising additional capital were considered and discussed, to wit: the issuance of new stock, bonds, and such other means, and there resulted the formation of Consolidated Tobacco Company (b). This company was organized by those holding large interests in the other two companies, to wit: The American Tobacco Company and Continental Tobacco Company. The American Tobacco Company had over $50,000,000 of common stock which was paying dividends at the rate of six per cent. per annum and preferred stock of $14,000,000 which was paying a dividend of eight per cent. per annum. Continental Tobacco Company had a capitalization of substantially $50,000,000 of common stock, which had not paid a dividend, but which was earning from two to four per cent., and a preferred capitalization of about $50,000,000 which was paying a fixed dividend of seven per cent. per annum. In order to furnish to these companies, for their English business and their cigar business, an adequate working capital, Consolidated Tobacco Company was formed with paid up cash capital of $30,000,000. The organizers of Consolidated Tobacco Company offered its bonds at the rate of $100 in par value bonds for each $100 share of Continental Tobacco Company common stock, and $200 in par value of its bonds for each $100 share of The American Tobacco Company common stock, and so acquired most of the common stocks of these two companies. This was simply an offer. No threats were made and no inducements were offered (c). There was a speculation on the part of the organiz-

(a) Record, Vol. II, p. 25.
(b) Record, Vol. IV, pp. 377, 721.
(c) Record, Vol. IV, p. 378.

ers of Consolidated Tobacco Company; their $30,000,000 was embarked; the holder of the common stock of The American Tobacco Company who saw fit to accept the offer received the equivalent of a dividend of eight per cent. per annum—whereas he had ordinarily received only six per cent. per annum on his stock—and the holder of Continental Tobacco Company common stock who accepted the offer received the equivalent of four per cent. per annum, whereas he had received nothing. The subscriber to stock of Consolidated Tobacco Company pledged his stock subscription to make good the fixed charges, and took the risk that the business would make a profit sufficient to pay these fixed charges and an income from his investment. This offer was generally accepted, but, after all, it was largely the acceptance of an offer by the same people who made the offer, for the holders of the common stocks of these two companies were to a large extent the very ones who formed Consolidated Tobacco Company (a).

From 1901 to 1904 the securities of these three tobacco companies were complicated. The American Tobacco Company had preferred stock outstanding and a remnant of its common stock; Continental Tobacco Company had a large issue of preferred stock and a remnant of its common stock; and Consolidated Tobacco Company had its stock and a large issue of bonds—these bonds had as their pledged security the common stocks for which they were issued. In the meantime, while the two companies were in fact not competitors, they were, nevertheless, in businesses related to each other; they had a common ownership in main; a common president; but a minority ownership in each, having no interest in the other. The possibilities of inter-stockholding misunderstanding and contention were unlimited. It was determined, in order to simplify the securities and to work gen-

(a) Record, Vol. V, pp. 389, 423.

erally toward economy and simplicity in the administration of the business, to merge these companies (a). The merger was accomplished under the laws of New Jersey, the State of the incorporation of each of said companies. There was attempted and effected an equitable distribution of the securities of the new company to take the place of the securities of the various old companies, having regard to priorities and income—so the preferred stockholders of The American Tobacco and Continental Tobacco Company received, as a first charge on the whole business, bonds carrying an equivalent income to their old preferred stock; secondly, the bondholders of Consolidated Tobacco Company received bonds, or at their option to the extent of half their holdings, preferred stock with a greater income and the junior security; and thirdly, the common stockholders received common stock. The consummation of the plan involved an increase of fixed charges, before dividends to common stock, of more than $1,600,000 per year, and it was the common stockholders only who paid this price of the merger (b).

In view of the great number of security holders, and the temptation that was involved in the largeness of the transaction, it is not surprising that suits were brought by Consolidated Tobacco Company bondholders to enjoin the merger, and that suits were subsequently brought by American preferred stockholders to dissolve the merger. In these suits the courts of New Jersey fully sustained and approved the merger (c).

Since 1904 the merged The American Tobacco Company has continued its operations as a manufacturer of tobacco, and it operates factories for the manufacture of smoking tobacco, plug tobacco, cigarettes and little cigars in New York City, Balti-

(a) Record, Vol. IV, pp. 379, 722.
(b) Record, Vol. IV, p. 379.
(c) Record, Vol. IV, p. 380.

more, Md., Richmond, Va., Danville, Va., Durham, N. C., Louisville, Ky., St. Louis, Mo., Middletown, Ohio, Chicago, Ill., New Orleans, La., and Clarksville, Tenn. Its business is primarily a manufacturing business, and its ownership of stock in other companies is merely incidental to such manufacture. Out of a total production in 1907 of 3,925,506,700 cigarettes, in which The American Tobacco Company had any sort of interest, 3,200,929,010 were manufactured in its own factories, leaving only one-fifth manufactured by companies in which The American Tobacco Company holds stock (a); in little cigars the proportion manufactured in factories belonging to The American Tobacco Company, as distinguished from those made by companies in which The American Tobacco Company holds stock, is even greater—in the factories belonging to The American Tobacco Company there were manufactured in 1907 over 942,000,000 little cigars, and by companies a part, or all, of whose stock belongs to The American Tobacco Company, less than 12,000,000 (b); during the same year The American Tobacco Company was interested in companies which produced 38,429,261 pounds of plug and twist tobacco, but it made in its own factories 98,778,622 pounds (c). Smoking tobacco is the only product which The American Tobacco Company produces, and also owns stock in companies which produce, where the major part is produced by such other companies and not in the factories of The American Tobacco Company itself; in 1907 companies in which The American Tobacco Company owned all or a part of the issued capital, manufactured 69,618,455 pounds of smoking tobacco, whereas in factories directly owned by The American Tobacco Company there was manufactured 58,020,076 pounds (d).

In the meantime The American Tobacco Company has become a representative industrial cor-

(a) Record, Vol. V, Gov. Ex. No. 77.
(b) Record, Vol. V, Gov. Ex. No. 81.
(c) Record, Vol. V, Gov. Ex. No. 79.
(d) Record, Vol. V, Gov. Ex. No. 78.

poration with a constantly increasing number of security holders. In the fall of 1905 there were 108 holders of its preferred stock, each holding one thousand shares or more, and 2,281 holders of preferred stock, each holding less than one thousand shares; 44 holders of its common stock each holding at least one thousand shares, and 276 holders of common stock each holding less than one thousand shares (a). In the spring of 1906 there were 114 holders of its preferred stock, each holding one thousand shares or more, and 2,751 holders of preferred stock, each holding less than one thousand shares; 54 holders of its common stock each holding at least one thousand shares, and 376 holders of common stock each holding less than one thousand shares (b). In the spring of 1907 there were 114 holders of its preferred stock, each holding one thousand shares or more, and 3,602 holders of preferred stock, each holding less than one thousand shares; 53 holders of its common stock each holding at least one thousand shares, and 425 holders of common stock each holding less than one thousand shares (c). At the end of the year 1907 there were 109 holders of its preferred stock, each holding one thousand shares or more, and 4,745 holders of preferred stock, each holding less than one thousand shares; 48 holders of its common stock each holding at least one thousand shares or more, and 584 holders of common stock each holding less than one thousand shares (d). There is no way of ascertaining the number of separate bondholders, but in view of the wide distribution of the stock and the large bond issue, it is safe to say that there are several thousand.

(*b.*) *Directly concerning the business of American Snuff Company and its predecessors.*

The American Tobacco Company when it purchased the business of Gail & Ax, in Baltimore, in

(a) Record, Vol. V, p. 393.
(b) Record, Vol. V, p. 397.
(c) Record, Vol. V, p. 402.
(d) Record, Vol. V, p. 406.

1890, acquired thereby a small snuff business. The snuff business of the country had been principally in the hands of very old manufacturers. As heretofore pointed out, "snuff" includes not only the product which, perhaps, gave it its name, that is, a product capable of being snuffed—a dry impalpable powder—but it includes also damp, heavily seasoned ground tobacco, that is more certainly in competition with ordinary chewing tobacco than it is with other snuffs (a). In the dry snuff the manufacturers were Garrett, Stewart-Ralph, Bruton & Condon and Lorillard, and in the damp, heavily flavored snuff, there were Helme, Weyman, as well as others.

In 1898 Atlantic Snuff Company was organized and acquired the manufacturing plants of some of these old and well established manufacturers, but did not acquire the business of The American Tobacco Company or Lorillard, Helme or Weyman, or various other large manufacturers (b). This organization was not in the interest of The American Tobacco Company, and it was not participated in by any of The American Tobacco Company interests.

The American Tobacco Company had never made a conspicuous success of its snuff business. It had an old snuff manufacturing plant acquired from Gail & Ax; Continental Tobacco Company had acquired a small business at Changewater, N. J. in 1899. But the total snuff product directly made by either the American or Continental Tobacco Company was small (c). At the time of the organization of Continental Tobacco Company it became the sole common stockholder of P. Lorillard Company, which had a substantial snuff business—one large enough, at any rate, to engage the serious thought of those having the responsibility of the conduct of the business of Continental Tobacco Company, and of P. Lorillard Co.

(a) Record, Vol. IV, p. 517.
(b) Record, Vol. IV, p. 483.
(c) Record, Vol. IV, pp. 381-2.

So Continental Tobacco Company and The American Tobacco Company, after this acquisition of the Lorillard business, made more serious efforts to establish and promote their snuff business. They had no well equipped snuff organization; neither The American Tobacco Company nor Continental Tobacco Company had made money out of their snuff business, but they were seeking to establish new brands, and to re-establish some of the older brands (a). The various snuff manufacturers who afterwards sold their businesses to Atlantic Snuff Company had met the officers of the American Tobacco Company, and had made efforts to purchase the snuff business of The American Tobacco Company; such efforts had not been successful. Negotiations were resumed in the spring of 1900, and resulted in the formation of American Snuff Company, which, immediately upon its organization, acquired the snuff business of The American Tobacco Company, Continental Tobacco Company and P. Lorillard Company, issuing therefor $7,500,000 of its common stock and $2,500,000 of its preferred stock, which stocks were distributed among those three companies according to the value of the properties turned over; the Atlantic Snuff Company conveyed all its property to this new American Snuff Co., receiving as consideration therefor $7,500,000 of preferred stock of American Snuff Company, and $2,500,000 of its common stock; American Snuff Company also acquired at the time of its organization the business of George W. Helme Company (though this was not contemplated when its organization was agreed upon) (b), issuing as a consideration therefor $2,000,000 of preferred stock and $1,000,000 of common stock (c).

The common and preferred stocks of American Snuff Company were given equal voting rights, so

(a) Record, Vol. IV, p. 381.
(b) Record, Vol. V, p. 148.
(c) Record, Vol. IV, p. 381.

The American Tobacco Company has never, from the date of the organization of American Snuff Company, had the power of control. It has not only lacked this power of legally controlling American Snuff Company, but it has not sought to exercise a practical dominance in American Snuff Company. The first president of American Snuff Company was George A. Helme, and he was, in fact as well as in name, the active and actual president. His connection had been with the George W. Helme Company and he had never had any connection with the American Tobacco Company (a). He was succeeded by Martin J. Condon, who was one of the vendors of Bruton & Condon's snuff business and had been active in the affairs of Atlantic Snuff Company (b), but never in any way connected with the American Tobacco Company.

The American Tobacco Company is accused of an effort to monopolize the tobacco business in all its branches, and it is notable that it has never from the outset had the power of control of either of the two largest domestic companies that it has had business relations with, to wit, Continental Tobacco Company and American Snuff Company. In the case of Continental Tobacco Company it was willing to sell its plug tobacco business to a company to be formed, taking $20,000,000 out of a total of $75,000,000, which would have constituted it a less considerable minority holder than it actually did become (c). In the case of American Snuff Company, even those directors who represent The American Tobacco Company's large stockholding interest do not direct—American Snuff Company is run by its own organization absolutely and entirely (d); when the views of The American Tobacco Company have disagreed with the views of other large

(a) Record, Vol. II, p. 444; Vol. IV, p. 382.
(b) Record, Vol. IV, p. 382.
(c) Record, Vol. IV, p. 353.
(d) Record, Vol. IV, p. 383.

stockholders, the views of the other large stockholders have prevailed (a).

American Snuff Company has been operating since 1900. It has a very large proportion of the snuff business of the United States, but it has acquired its volume through effective business enterprise, and by the peculiarities of the snuff business, and not by contracts in restraint of trade, nor attempts to monopolize. To illustrate: W. E. Garrett & Sons manufactured one brand of snuff called "Garretts." Its business in 1900, when American Snuff Company was formed, was 1,801,378 pounds, and in 1906 the business on that identical brand was 5,965,840 pounds (b). Now, Garrett's snuff has not acquired this tremendous increase by being sold at cheap prices. Garrett's snuff goes to the trade at the highest price of any of the dry snuffs. It has gotten its growth because of the momentum of the brand and the activity of the company in sampling and advertising. "When women get together in the "country where they use snuff and one of them "leaves a box at home, and she asks one to give "her some snuff, it is most likely she will get "'Garrett's,' or the brand that is most popularly "used, so that by degrees that brand eats right "in and eats up the small ones, and that is "the way that the growth occurs" (c). American Snuff Company began its business with a sale during 1900 of 9,315,303 pounds out of a total snuff business of 13,805,311 pounds. Its president estimates that the businesses of the factories it has purchased would represent annually sales of more than 2,000,000 pounds (d). But American Snuff Company is to-day doing in its own factories, and the factories of companies all of whose stock is owned by it, a business of 22,067,234 pounds. So, charging against American Snuff Company the busi-

(a) Record, Vol. IV, p. 491.
(b) Record, Vol. V, Gov. Ex. No. 82.
(c) Record, Vol. IV, p. 515.
(d) Record, Vol. IV, p. 515.

nesses that were originally bought by it and the businesses subsequently acquired by purchase, there yet remains a substantial doubling of its volume by the fact of a fortunate investment in brands that met the public taste, and an intelligent enterprise in advertising and marketing these brands. The "Garrett's" brand and the favor it enjoys, to the extent of being in some sections the snuff that is universally called for, is one illustration of this growth, and the Weyman brand, increasing as it did after its purchase in July, 1905, by American Snuff Company from an annual business of less than 1,000,000 pounds to a business in 1907 of 2,000,000 pounds, is an illustration of the effectiveness of the enterprise of the Company (a).

As just hereinbefore indicated, the purchases by American Snuff Company of other businesses have not been considerable. The Weyman purchase, made in 1905, was a large one; the purchase of the Standard Snuff Company's stock, made in 1904, and the purchase of the stock of the Devoe Snuff Company, made in March, 1901, were comparatively large. But most of the purchases by American Snuff Company have been of businesses that were desired to be sold, because of death, or other such private matters connected with the vendors. Indeed, one is struck with the number of such purchases and the small aggregate of businesses conveyed (b).

(c.) *Directly concerning business of American Cigar Company and its predecessors.*

The American Tobacco Company had been in the business of manufacturing cheroots since 1891, when it purchased the factory and business of P. Whitlock of Richmond. It had also been in the little cigar business since 1895, when it purchased

(a) Record, Vol. IV, p. 510.
(b) Record, Vol. IV, p. 512–514.

the properties of Consolidated Cigarette Company, Thomas H. Hall and Herman Ellis. It had not purchased other cheroot manufactories, but it had extended its little cigar business by its purchase, in 1898, of the manufacturing plant of Herman Mandelbaum (a), and in 1899 of the manufacturing plant of M. S. Pacholder Company (b).

There is no distinction made by Internal Revenue statutes between cheroots and cigars. They are all simply cigars, and pay a like tax, and are subject to other like regulations. Cigars are divided for the purposes of Internal Revenue collection and regulation, into cigars weighing more than three pounds to the thousand, and cigars weighing less than three pounds to the thousand. The first class is called simply "cigars," and pay a tax of three dollars per thousand. Little cigars are packed like paper cigarettes in statutory packages of ten, twenty, fifty and one hundred, and they pay a tax of fifty-eight cents per thousand.

In January, 1901, a contract was made for the organization of American Cigar Company (c). The parties to this contract were The American Tobacco Company, Continental Tobacco Company, and Powell, Smith & Company, the latter a cigar manufacturing concern which had sold, in the year 1900, about 70,000,000 cigars, receiving therefor $2,189,919.44. The contract contemplated the creation of a corporation with a capital, when issued, of ten million dollars, of which forty-six and one-half per cent. was to be taken and paid for in cash at par by The American Tobacco Company or its nominees, forty-six and one-half per cent. by Continental Tobacco Company or its nominees, and seven per cent. by the partners constituting the firm of Powell, Smith & Company. This contract does not contain any express provisions that this company should thereafter acquire the che-

(a) Record, Vol. IV, p. 359.
(b) Record, Vol. IV, p. 365.
(c) Record, Vol. V, p. 165.

root business and the factories for the manufacture of cheroots theretofore carried on by The American Tobacco Company, but it was in the contemplation of the parties, and not long after the formation of the company it did make such purchase (a). While the contract of January 3, 1901 (b), to which reference has already been made, provided that forty-six and one-half per cent. of its capital stock should go to the American Tobacco Company or its nominees, and forty-six and one-half per cent. to Continental Tobacco Company or its nominees, the actual plan of organization contemplated that The American Tobacco Company and Continental Tobacco Company respectively should take thirty-five per cent. of the total capital, instead of forty-six and one-half per cent., so that the Cigar Company would have an issued capital of ten million dollars of which The American Tobacco Company and Continental Tobacco Company in the aggregate would own seven million dollars, and individuals useful in the conduct of the business, including members of the firm of Powell, Smith & Co., would own the other three million dollars (c).

The action of the American Tobacco Company and Continental Tobacco Company in causing the organization of a new company to go into the cigar business, was principally induced by a desire to secure the co-operation of cigar manufacturers that understood the business, and thus get an organization to handle the cigar business (d). Along this line, American Cigar Company, soon after its organization, acquired the cigar manufacturing business of Harburger, Homan & Company, making payment partly in stock and partly in cash, and the factories of Havana American Company which made cigars of a different grade from those manufactured by Harburger, Homan & Company

(a) Record, Vol. IV, p. 383.
(b) Record, Vol. V, p. 165.
(c) Record, Vol. IV, p. 383.
(d) Record, Vol. IV, p. 383.

or Powell, Smith & Company. These were large manufacturers, but they were not the largest manufacturers, and their acquisition by American Cigar Company by no means gave it even a commanding place in the cigar business (a).

In the meantime the changes of tariff conditions incident to the Spanish War induced American Cigar Company to become interested in Porto Rican and Cuban cigars. In 1899, The American Tobacco Company had co-operated in the formation of Porto Rican-American Tobacco Company to take over a cigar and cigarette manufacturing plant in Porto Rico owned by a co-partnership; The American Tobacco Company, upon the organization of the corporation, acquired a majority of its stock for cash. At its beginning this Porto Rican-American Tobacco Company was principally engaged in the manufacture of cigarettes for sale on the Island of Porto Rico. After there was established free trade between Porto Rico and the United States, it became evident that a very considerable market for Porto Rican cigars could be established and maintained in the United States. The American Tobacco Company sold to American Cigar Company at an agreed price, half of its holdings of Porto Rican-American Tobacco Company, and American Cigar Company marketed these Porto Rican cigars until after the institution of this suit and after a large part of the testimony was concluded. The change of policy on the part of Porto Rican-American Tobacco Company and its determination to market its own goods, had no connection, however, with the institution of this suit—it was a change of business methods such as is frequently and from time to time being made by men in business, "because the "president of the Porto Rican-American Tobacco "Company believes that through an organization of "its own, or the company's own creation here in "the United States, that he could sell more cigars

(a) Record, Vol. III, pp. 20-22.

" and make more money than he could by having " American Cigar Company act as selling agent " (a). So far as the cigarettes of Porto Rican-American Tobacco Company are concerned, they still cut little figure in this country; their substantial sale is limited to Porto Rico (b).

Early in 1902 American Cigar Company, with a desire to broaden the basis of its business, entered into negotiations with, and bought the manufacturing plant and business of, H. de Cabanas y Carbajal, and caused the organization of a corporation to take over that business (c). The cigar manufacturers in Cuba, counting those only of substantial businesses, are very numerous, some making cigars popular in one part of the world, and some in another—Cuban grown tobacco has a real monopoly in the manufacture of the highest priced cigars the world over. In May, 1902, American Cigar Company co-operated with owners of Havana Commercial Company, Cuban cigar manufacturers, and owners of Henry Clay and Bock & Company, Limited, Cuban cigar manufacturers, in the formation of Havana Tobacco Company, and Havana Tobacco Company took over such of the stocks as could be obtained of these two companies, and all the stock of H. de Cabanas y Carbajal. It made an offer to all the securityholders, but certain of the holders of the English company, and certain of the holders of the Havana Commercial Company, saw fit not to accept the offer of exchange. Henry Clay and Bock & Company, Limited, had, among its assets, a majority of the stock of Havana Cigar and Tobacco Factories, Limited, an English Corporation (d), also a Cuban cigar manufacturer.

After August, 1902, Havana Tobacco Company purchased the factory and business of another

(a) Record, Vol. III, p. 65.
(b) Record, Vol. III, p. 19.
(c) Record, Vol. III, p. 26.
(d) Record, Vol. III, p. 79.

Cuban manufacturer, not in the contemplation of any of the parties at the time of the formation of Havana Tobacco Company, J. S. Murias y Ca., and in order to have a better chance of maintaining and preserving the business, caused the formation of a corporation of that name, to take over such factory and business (a). Havana Tobacco Company has an issued capitalization of thirty-five million dollars, of which five million dollars is preferred stock, and thirty million dollars common stock. For a while it acted as the selling agent of the companies whose stock is owned, but latterly one of these companies, Henry Clay and Bock & Company, Limited, has become the selling agent of the other companies (b). These companies manufacture in the aggregate less than half the cigars manufactured in the Island of Cuba, and less than half of the cigarettes manufactured and sold there. The cigarettes made by these companies and the other Cuban manufacturers are principally consumed in Cuba, and of the cigars, not more than twenty-five per cent. made by these companies come to the United States (c).

(*d.*) *Directly concerning the business of American Stogie Company.*

In May, 1903, American Cigar Company cooperated with the stockholders of the United States Cigar Company in the formation of the American Stogie Company to which there was conveyed the business of United States Cigar Company and the stogie business of American Cigar Company. Capital stock was issued in consideration of these conveyances, a majority of the stock to American Cigar Company (d). Stogies are cigars of the crudest manufacture (e). American Stogie Company has

(a) Record, Vol. III, p. 79.
(b) Record, Vol. III, p. 80.
(c) Record, Vol. III, p. 27.
(d) Record, Vol. V, p. 28.
(e) Record, Vol. III, p. 683.

not acquired any factories, and it is engaged in the manufacture of stogies, cheroots and cigars, the cheaper kind, including cigars ordinarily sold at retail at five cents a piece (a). American Stogie Company manufactures, so far as can be estimated, about fifteen per cent. of the stogies manufactured and sold in this country and one or two per cent. of the cheap cigars (b). It conducts its own leaf buying department and its own selling department (c).

(e) *The defendant companies which furnish supplies to, or buy supplies for, other defendants.*

Golden Belt Manufacturing Company.

Certain forms of maufactured tobacco are sold in cloth packages. Granulated smoking tobacco uses a great many of these cloth packages, going to the trade as it does in separate packages of an ounce and an ounce and two thirds. In 1887, the president of Blackwell's Durham Tobacco Company (which had no connection with The American Tobacco Company until 1899) caused the organization of Golden Belt Manufacturing Company to make such bags and utilize a patented machine (d). In 1899 after the acquisition of Blackwell's Durham Tobacco Company by The American Tobacco Company, The American Tobacco Company acquired an interest in, and caused a reorganization of, this company and an enlargement of its business. This was done at the instance of the previous owners of the business, and in co-operation between these previous owners and The American Tobacco Company (e) From time to time The American Tobacco Company has acquired the stock of other stockholders until it now owns about ninety-three per cent. of the stock of Golden Belt Manufacturing

(a) Record, Vol. III, p. 683.
(b) Record, Vol. III, p. 687.
(c) Record, Vol. III, pp. 684, 686.
(d) Record, Vol. III, p. 581.
(e) Record, Vol. III, p. 582.

Company (a). Among these other stockholders whose stock was acquired soon after 1899, were certain individuals, directors of The American Tobacco Company, and they turned in their stock at its value as estimated by the directors of The American Tobacco Company who were not such stockholders of Golden Belt Manufacturing Company, and so avoided the possibility of charge that they profited by a connection with a company furnishing their other companies supplies (b). Since The American Tobacco Company has had control of this Golden Belt Manufacturing Company, which was originally simply a bag manufacturing company, that company has improved its plant, and built a cotton mill so that it makes the cloth that it needs in the making of the bags it sells. It sells The American Tobacco Company under a contract fixing the price subject to fluctuations as the price of cotton fluctuates, so as to give to the bag company a profit of from eight to nine per cent. (c).

This company is almost altogether a supply company of The American Tobacco Company, about ninety-seven per cent. of its output going to The American Tobacco Company, or companies controlled by it, and only about three per cent. to independent tobacco manufacturers (d). It solicits the business of independent tobacco manufacturers and sells some of them their bags, but it sells no bags at less than cost, and it has no monopoly of the bag business. Independent tobacco manufacturers may either buy from it or from at least two competing concerns mentioned in the testimony (e). The patents that existed in 1887 have expired, and it does not use any patented machinery at all (f).

(a) Record, Vol. III, p. 581.
(b) Record, Vol. IV, p. 408.
(c) Record, Vol. III, p. 582.
(d) Record, Vol. III, p. 583.
(e) Record, Vol. III, p. 585.
(f) Record, Vol. III, p. 584.

Conley Foil Company.

The American Tobacco Company is a large user of tin foil. In 1900 representations were made to The American Tobacco Company that an effort was being made, or in contemplation, by foil manufacturers, to enter into a combination to force up the price of tin foil; this might have inconvenienced the American Tobacco Company at least temporarily, because it takes some time to build machinery to roll out the foil (a). In this condition and at the instance of John Conley & Sons, foil manufacturers, The American Tobacco Company co-operated with John Conley & Sons in the organization of the Conley Foil Company, which was thereupon organized, the plant of John Conley & Sons being their contribution to the capital of the new company at an agreed valuation, and The American Tobacco Company contributing cash so as to make its holdings of stock sixty per cent. of the new company. Conley Foil Company having been thus formed entered into an agreement with The American Tobacco Company to furnish it its requirements of tin foil at an agreed price per pound over cost of raw material, and it has been furnishing the American Tobacco Company on that basis ever since. From time to time this contract price has been extended to companies in which The American Tobacco Company is interested as stockholder, including the R. J. Reynolds Tobacco Company, S. Anargyros, F. F. Adams Tobacco Company. Certain other companies in which The American Tobacco Company is interested have been furnished as if they were outside companies on the open market basis (b). In August, 1903, The Conley Foil Company acquired a majority of the stock, and thereafter all the stock, of The Johnston Tin Foil and Metal Company, of St. Louis, Missouri (c). This acquisition was made as an insurance

(a) Record, Vol. IV, p. 409.
(b) Record, Vol. III, p. 155.
(c) Record, Vol. III, p. 158.

against fire, or such other casualty as might temporarily make the Conley Foil Company at its single plant in New York unable to supply the requirements of The American Tobacco Company (a) The Conley Foil Company had had some labor trouble at its New York factory, and its officers felt that on that account, and in order to prevent a sympathetic strike in the Johnston plant, it was desirable that its relations to the Johnston Company should be kept secret, and to that end these relations were kept secret (b). Of the output of the Conley Foil Company from 70 per cent. to 75 per cent. goes to The American Tobacco Company and companies of which it owns stock,and the balance goes to outside trade (c). It sells to any one that needs tin foil and it is in competition, occasionally more or less warm, with two large tin foil manufacturers; one of them having an output of about five and a half million pounds annually (d). The three, Lehmaier, Schwartz & Company, Conley Foil Company and J. J. Crook Company, are substantially the only tin foil producers in the country, Conley Foil Company having acquired the Johnston Tin Foil & Metal Company of St. Louis, and Lehmaier, Schwartz & Co. having in the last few years acquired the business formerly carried on by the Patent Metal Company of Philadelphia, and the Palen Tin Foil Co. of Kingston, New York. In the competition for the foil business, Conley Foil Company has occasionally, in order to hold a customer, sold its goods below cost, but it has been no general practice, having been done not more than twenty times in five years (e). So far as this has been done at all it has been done not only without the procurement of The American Tobacco Company, but against its wishes; the attitude of The American

(a) Record, Vol. III, p. 158.
(b) Record, Vol. III, p. 161.
(c) Record, Vol. III, p. 157.
(d) Record, Vol. III, pp. 161, 305.
(e) Record, Vol. III, pp. 297, 298.

Tobacco Company being that it does not care whether The Conley Foil Company sells any foil to others than The American Tobacco Company or not (a).

Mengel Box Company.

In 1899 Continental Tobacco Company acquired a majority interest in the Mengel Box Company, a corporation in whose organization it had co-operated, to which was conveyed the plant of C. C. Mengel, Jr., & Bro. Company, a Kentucky corporation, engaged in the manufacture of boxes, including boxes for tobacco. Continental Tobacco Company conveyed a small box factory of its own to Mengel Box Company. Mengel Box Company has, since its organization, acquired the capital stock of Columbia Box Company and Tyler Box Company, both of St. Louis, Missouri. A majority of its stock continued to be held by Continental Tobacco Company until the merger of 1904, when it passed to the present The American Tobacco Company (b). This company was formed at the instance of C. C. Mengel, and its organization resulted in a decrease in price for tobacco boxes being paid by Continental Tobacco Company. The American Tobacco Company is furnished under five-year contracts and when the price of lumber increases the management of Mengel Box Company advances proportionately the price of boxes (c). Mengel Box Company furnishes boxes to other manufacturers, but there is absolutely no evidence that it has ever furnished boxes at below cost or at any unduly small profit. Mengel Box Company on several occasions gave to The American Tobacco Company statements as to purchases of boxes by certain independent manufacturers, and this fact was by Government counsel called to the attention of one of the independent manufacturers, Mr. Peper, who shows that he and other independent manufacturers bought their boxes

(a) Record, Vol. III, p. 301.
(b) Record, Vol. IV, p. 407.
(c) Record, Vol. V, p. 9.

with the knowledge of the connection between The American Tobacco Company and Mengel Box Co., and that it made no difference to them that Mengel Box Co. furnished this information, because The American Tobacco Company could find out their output by a calculation made from Government figures, as well as by other means (a).

MacAndrews & Forbes Company.

Licorice paste is an ingredient in the manufacture of plug tobacco; its extraction had been for many years in the hands of a few large concerns who obtained their root supplies from Russia and Turkey, and extracted the licorice paste in plants situated in the United States. Soon after Continental Tobacco Company was formed, it was invited to purchase the plant of the Stamford Manufacturing Company, and an investigation showed that the Stamford Manufacturing Company was making very little profit. Liggett & Myers Tobacco Company manufactured some of its own licorice and when Continental Tobacco Company acquired that concern it found that the cost to Liggett & Myers Tobacco Company of manufacturing licorice was more than Continental Tobacco Company was paying for it (b). This was an obviously dangerous situation—it was evident that things would not continue in that condition—either there would be a combination of licorice manufacturers, or the strongest would destroy the weaker ones, thus, in either event, requiring Continental Tobacco Company to purchase its licorice from one manufacturer. Continental Tobacco Company being apprehensive of this condition, secretly acquired a majority interest in the Mellor & Rittenhouse Company and jealously maintained the secrecy until it could build works sufficient to produce the licorice it required and acquired an adequate stock of root. It did this for fear of a combination among the other manufacturers which would, in the mean-

(a) Record, Vol. IV, p. 658.
(b) Record, Vol. IV, pp. 409, 410.

while, have Continental Tobacco Company at its mercy (a). Having secured such facilities for manufacturing and root supply, Continental Tobacco Company entered into negotiations with MacAndrews & Forbes, which, in 1902, resulted in the formation of MacAndrews & Forbes Company, which acquired the manufacturing plants of Mellor & Rittenhouse Company and of MacAndrews & Forbes. Preferred stock was issued representing the value of the tangible assets, and Continental Tobacco Company acquired seventy per cent. of the common stock, which at the merger in 1904 passed to The American Tobacco Company (b). At the time of the formation of MacAndrews & Forbes Company a contract was entered into between it and Continental Tobacco Company fixing the price of licorice at 7 1/2 cents per pound, which was, at the time, thought to be a fair price, but this was afterwards raised to eight cents a pound, because seven and a half cents, as Continental Tobacco Company concluded, was not a fair price, sufficient to enable the preferred stockholders and minority common stockholders to earn a fair return (c).

In 1903, officers of Continental Tobacco Company and officers of MacAndrews & Forbes Company became very apprehensive of the supply of licorice root. Licorice root is grown in Southern Russia, the Caucasus of Russia, Asia Minor, Syria and Turkish Arabia (d); at that time the Japanese-Russian War was imminent, there had been great disturbance in Turkey, and the hazards ordinarily incident to the gathering of root seemed to be greatly increased; so that the president of The American Tobacco Company urged that there should be a three years' stock of root carried in lieu of a two years' stock; the president of MacAndrews & Forbes Company stated that there was great difficulty in

(a) Record, Vol. IV, p. 410.
(b) Record, Vol. IV, p. 410.
(c) Record, Vol. IV, p. 412.
(d) Record, Vol. III, p. 325.

increasing the root supply, largely because of the competition in the root field of Young's organization, and that if this did not stop the price of root might be doubled without getting any more root. In the same conversation he mentioned also the constant shipment of root to the United States on consignment, as a disturbing factor in the Oriental root market, and that the business of J. D. Lewis stimulated that (a). On acoount of this desire to get rid of this sort of competition in the root field, the contracts were made between MacAndrews & Forbes Company and J. S. Young Company and J. S. Young Company and J. D. Lewis, shown on the record (b). So far as the contract with Young is concerned, it was a mere purchase of a majority of the stock of the Young Company by MacAndrews & Forbes Company and the establishment of contractual relations for the security and benefit of minority holders. These contracts were made for the purpose of eliminating competition in the purchase of root, but not at all to eliminate competition in the sale of licorice paste (c). The American Tobacco Company was not interested in the price of licorice paste to other manufacturers, and in fact did not care whether MacAndrews & Forbes Company, or any of its interests, sold them paste at all or not (d). The contracts as made were not dictated by The American Tobacco Company—the direction or advice of The American Tobacco Company to MacAndrews & Forbes Company was to buy out Young and Lewis—not to enter into contracts with them (e).

These arrangements between MacAndrews & Forbes Company, Young and Lewis continued until June, 1905, at which time the Lewis arrangement terminated, and from 1905 until the present

(a) Record, Vol. IV, p. 411; Vol. III, p. 373.
(b) Record, Vol. V, pp. 89, 99.
(c) Record, Vol. III, p. 373.
(d) Record, Vol. IV, p. 412.
(e) Record, Vol. III, p. 374.

time there has been no arrangement or understanding between any of the defendants and John D. Lewis (a). In June, 1906, the arrangement with Young was terminated and MacAndrews & Forbes Company bought its business (b). In 1905 and 1906 MacAndrews & Forbes Company began offering, and since then has constantly offered, to all tobacco manufacturers to sell them licorice paste without contract at the price of nine cents per pound, or, at their option, to enter into a ten year contract whereby the manufacturer is to secure from MacAndrews & Forbes Company his licorice paste as low as any other customer (including The American Tobacco Company) pays—the present price, and the price that has obtained since the offering of this contract to such contract customers is eight cents a pound (c). These contracts were offered to all tobacco manufacturers whether particularly hostile to The American Tobacco Company or not, and they have been accompanied by explanations of the impracticability of any manufacturer of licorice venturing to make a fixed price for more than one or two years ahead, because of the very great changes to which the root supply is subject (d). By virtue of these contracts any independent tobacco manufacturer can now obtain his licorice supply from MacAndrews & Forbes Company, by entering into this contract, at the same price that the American Tobacco Company pays for its much larger requirements, and The American Tobacco Company is under no temptation to advance its own price in order to advance the price that its competitors pay, for the reason that The American Tobacco Company takes a larger proportion of the licorice output than it owns stock in MacAndrews & Forbes Company and its temptation is, therefore, to reduce the price of licorice paste to the injury of stockholders of

(a) Record, Vol. III, pp. 345, 371.
(b) Record, Vol. III, pp. 345, 346.
(c) Record, Vol. III, pp. 380, 381.
(d) Record, Vol. IV, p. 413.

MacAndrews & Forbes Company rather than to raise it to the injury of itself and other tobacco manufacturers (a). But if the independent tobacco manufacturer, fearful of longtime contracts, so desires, he may purchase on open account, without contract, at nine cents a pound, and certainly this is not an unreasonable differential considering the risks of the business, and it is not an unreasonable price for the paste, for the average cost to McAndrews & Forbes Company for the past five years has been 7.2 cents per pound (b). The long time contracts were not conceived with a view of establishing or prohibiting a monopoly; the initiative for them was taken by independent tobacco manufacturers themselves (c). And if they had been meant to force a monopoly, there would have been a larger differential as an inducement to the tobacco manufacturers to enter into them, than one cent per pound.

It is true that MacAndrews & Forbes Company has a large proportion of the licorice business of this country; it is a very old concern, and its goods are popular as shown by the fact that after The American Tobacco Company acquired the ownership of Mellor & Rittenhouse Company, its factory managers desired to continue the use of MacAndrews & Forbes licorice (d). But a manufacturer of tobacco who desires, can still obtain paste either from J. D. Lewis, with whom MacAndrews & Forbes Company has absolutely no arrangement, Weaver & Sterry, or the Greaves Pharmaceutical Company (e). That these concerns have not a larger proportion of the business is only because of the preference for the paste manufactured by MacAndrews & Forbes Company. Tobacco manufacturers not only have these options, but it is entirely feasible

(a) Record, Vol. III, p. 365.
(b) Record, Vol. III. p. 365.
(c) Record, Vol. III. p. 365.
(d) Record, Vol. IV, p. 410.
(e) Record, Vol. III, p. 372,

for them to buy from MacAndrews & Forbes Company, or the other licorice manufacturers, their immediate requirements, and in the meanwhile import root and manufacture their own licorice, as three independent tobacco manufacturers are now doing (a).

No discussion has been had here of the indictment of MacAndrews & Forbes Company and others which resulted in the conviction of some of those indicted and the acquittal of others; it seems to these defendants that all reference to such indictment is immaterial and incompetent. If it is not, these indictments were based upon conditions whose existence terminated before the indictments were found, and more than a year before the filing of the petition in this suit. The condition of MacAndrews & Forbes Company to-day is that of a mere manufacturing company engaged in the manufacture of a product used in the manufacture of tobacco, and having a large proportion of the business of the United States in this product; it is not only willing to make long-time fair contracts, but it is willing to sell its products at a fair price, without any contract; and if the user of its products is unwilling to either enter into a contract or make open purchases, he has not only the theoretical privilege, but the practical opportunity, to buy from others disconnected with MacAndrews & Forbes Company, or manufacture for himself.

The Kentucky Tobacco Product Company.

This company is not a supply company, but it is mentioned here because there exists no other class for it.

In 1899, Continental Tobacco Company, in an effort to utilize the stems that were a by-product in its manufacture, co-operated with the owners of the Louisville Spirit Cured Tobacco Company in the

(a) Record, Vol. III, p. 371.

organization of the Kentucky Tobacco Product Company, with which company Continental Tobacco Company entered into contracts to furnish it stems. As a part of the consideration for these contracts, and undoubtedly to secure the interest of the Continental Tobacco Company in the venture, it was given two-thirds of the common stock of Kentucky Tobacco Product Co., its preferred stock having issued at par for tangible assets (a). These stems, or as they may be called, *offal*, from tobacco, are manufactured by The Kentucky Tobacco Product Company into a nicotine insecticide, fertilizers, &c. The Kentucky Tobacco Product Company has developed this business, with the result that The American Tobacco Company receives more for its stems, or offal, than ever before, and other tobacco manufacturers do likewise. What was thrown away substantially, by tobacco manufacturers heretofore, has become by the enterprise and intelligence of The Kentucky Tobacco Product Company, an article of value (b).

Amsterdam Supply Company.

It might be assumed that The American Tobacco Company, with the Golden Belt Manufacturing Company, The Conley Foil Company, Mengel Box Company and MacAndrews & Forbes Company had adopted a definite policy of furnishing its own supplies, exclusive of leaf tobacco. This is by no means so, however; it manufactures for itself the supplies of which the tobacco business is a very large user, or which it is necessary for it to manufacture for itself as a matter of assurance of getting a suitable supply for its requirements. But there are countless things used by tobacco manufacturers with which it supplies itself in the open market. Printed matter for packing and advertising, sugar, glycerine and other flavoring materials are but a few that immediately occur to one, of which the aggregate requirements of The American Tobacco Com-

(a) Record, Vol. IV, p. 405–6.
(b) Record, Vol. IV, p. 405–6.

pany and companies in which it holds stock must be very considerable. The intelligent purchase of these supplies, negotiations for prices, checking up of bills, &c., is a very large undertaking. And with respect to many of them there is a real advantage in purchasing by wholesale, as opposed to retail purchases, and if a volume of purchases may be gotten sufficient to deal with manufacturers rather than jobbers, there is a still greater economy. In 1903, various companies in which there was an interstockholding interest, united in the formation of Amsterdam Supply Company, a purchasing agent. It has a capital stock of $250,000, and various companies took stock in it in proportion to their purchases of such supplies, with the understanding that, having the benefit of this ownership, they should either do their purchasing through this company, or, at their option, buy otherwise, but pay on their purchases the one per cent. charged other stockholders. This supply company naturally watches the market of these various products, and has an office force capable of managing the detail of such purchases, so it not only buys for its stockholders, but for others as well, charging such others not the one per cent. that it charges its stockholders, but two, three or five per cent., as it is able to do (a).

Defendants apprehend that the only interesting question to the Court with respect to this Amsterdam Supply Company is whether it has the primary purpose of effecting an economy to those operating through it by the withdrawal of competition. If it does not it is not amenable to any anti-trust law, or any other law, for neither men nor corporations are forbidden simply to co-operate—they are only forbidden to co-operate with the effect or intent of thereby eliminating competition and the public benefits which ordinarily flow therefrom.

Amsterdam Supply Company does not thus effect its economy, and indeed it does not withdraw com-

(a) Record, Vol. III, pp. 280–1.

petition at all; every company is free so far as contract is concerned to buy as it pleases. While the stockholding companies (many of the defendant companies are not stockholders at all) pay a commission of 1 per cent. on goods bought, whether through the Amsterdam Supply Company or not, there is left perfect freedom of competition, and best prices and best service are the only factors that give business to Amsterdam Supply Company (a).

The president of Amsterdam Supply Company is a witness for the Government, and he emphatically denies that it was the purpose of the organization of Amsterdam Supply Company to eliminate competition, or that there has resulted any economy by the lessening of such competition.

> "The reason I thought it would be cheaper was because it would gather up the needs of the different factories and get them into a larger volume; of course it would entitle us to a better price from the manufacturers or jobbers, as the case might be, than it would in a smaller quantity.
>
> Q. Is the competition which would exist if these companies were buying separately in their purchase of sugar, for instance, sufficient to enhance the price of sugar, I mean their aggregate purchases of a sufficient proportion of the entire output of sugar, affect the price?
>
> A. No, sir.
>
> * * * * *
>
> Q. In truth, Mr. Reed, in the absence of special circumstances there may be how many different prices of supplies generally; how many different grades or gradations in prices?
>
> A. Oh, I should say that there are three market values practically for everything; there is the manufacturer's price, the jobber's price and the retail price.
>
> Q. And your idea in the formation of the Amsterdam Supply Company was to buy at first price?
>
> A. To buy from the manufacturers, of course.
>
> Q. With respect to any of the supplies pur-

(a) Record, Vol. III, pp. 282-4.

chased by you, whether sugars, printed matter, lumber or other supplies, has there been in your judgment a diminution of price merely by intelligent marketing and buying wholesale quantities?

A. I think it is in the intelligent marketing, in buying in wholesale quantities; I don't think the competition has anything to do with the various prices" (a).

In the face of this direct, reasonable and uncontradicted testimony it is hard for these defendants to conceive how it will be contended that the organization and operation of the Amsterdam Supply Company had either the purpose or has the effect of a hurtful elimination of competition. If it purchased leaf tobacco the case would be different—but it buys none. If it fixed the prices which tobacco manufacturers paid for licorice, tin foil or other articles of which tobacco manufacturers in the aggregate use so large a proportion of the total output as to be factors in fixing the price, it might be different. But while it attends to the billing and quantities of these latter articles it has nothing to do with actually buying any such articles. Its activities are only in purchasing sugar, printed matter and such commodities of which the combined requirements of the defendants are not sufficient (noting the entire output of the commodities), to affect the market price by being combined or segregated. To condemn the co-operation that is involved in the formation and operation of Amsterdam Supply Company would be to condemn all the various mutual insurance companies, and the less important shopping agencies, that abound, and, indeed, any possible co-operative action.

(*f.*) *English business and affairs of British-American Tobacco Company, Limited,—including English contracts.*

The American Tobacco Company, from its incorporation in 1890, had a business in England.

(a) Record, Vol. III, p. 292.

This business was the selling there of cigarettes, manufactured in the United States, and during some of the years between 1890 and 1901 this business averaged a net profit to The American Tobacco Company of $150,000 (a). The English tariff during all of these years was intended to encourage the manufacture of tobacco products in England, so there was a tariff differential in favor of the home manufacturer as against the foreign manufacturer that was substantial. This differential represented the difference between the duty imposed upon imported leaf tobacco and upon the imported manufactured product which a given quantity of tobacco would manufacture (b). While the cigarette business of England was in its pioneer state, The American Tobacco Company could afford to stand this disadvantage of a tariff differential, but as its business grew, and English manufacturers engaged in it, the cheaper cigarettes were popularized, so that the leading commercial cigarette of England was one that retailed at five for a penny equal to ten for four cents. Neither The American Tobacco Company, nor any one else, could put out a cigarette manufactured in America to be sold at that price, and so the business of The American Tobacco Company was diminished substantially one-half (c). The operations of this differential and the utter impossibility of profitably conducting a cigarette business in England with goods manufactured in America are clearly shown by Government's witness W. R. Harris, the present chairman of the British-American Tobacco Company (d).

In 1901 it was evident to The American Tobacco Company that it must do its manufacturing for the English market in England, and to that end the president and other officers of The American To-

(a) Record, Vol. II, p. 25.
(b) Record, Vol. II, p. 25.
(c) Record, Vol. II, p. 53.
(d) Record, Vol. II, p. 54.

bacco Company went to England in the fall of 1901, having had already some investigation made of the trade conditions there. The result was that The American Tobacco Company acquired the manufacturing plant of Ogden's Limited, an English cigarette manufacturer, with a factory in Liverpool, already prominent in the English trade (a). This was done by the acquisition of substantially all of the stock or share capital of this English corporation, and no concealment was made of such acquisition (b). Ogden's Limited had been actively competing for the English business before 1901, and with the addition of the new capital and vigor of The American Tobacco Company, became more active in such competition (c).

In the fall of 1901 several of the large English manufacturers, especially of cigarettes, caused the organization of The Imperial Tobacco Company (of Great Britain and Ireland), Limited, and sold their manufacturing plants to it (d). The competition between it and Ogden's Limited became quite strenuous, there resulting offers of bonuses and other like characteristics of keen competition (e). The Imperial Tobacco Company also succeeded to the foreign business of the manufacturers who had sold their plants to it. This business in the United States was, of course, not large, because tariff conditions in the United States were even more disadvantageous to a foreign manufacturer in competition with a domestic manufacturer than English conditions to a foreign manufacturer. In the first place, the English manufacturer secured his raw material from America, and had to take it over to England and manufactured it; when his goods arrived in this country they were subject to the same internal revenue tax as domestic manufacturers,

(a) Record, Vol. II, p. 26.
(b) Record, Vol. II, p. 27.
(c) Record, Vol. II, p. 27.
(d) Record, Vol. II, pp. 23, 24.
(e) Record, Vol. II, p. 28.

together with an import tax of fifty-five cents a pound on manufactured tobacco, and a still heavier tax on cigarettes (a). This brought about the result that the importation of English made goods into the United States was very small as compared with the total volume of business, but, including tobaccos and cigarettes (reduced to the basis of pound weight), it is estimated to have been about one hundred thousand (100,000) pounds (b). The brands manufactured by The Imperial Tobacco Company had a good reputation in the United States and might form the *nucleus* for a valuable trade except for this prohibitive protective tariff.

In the fall of 1902 negotiations were entered into in England which resulted in the sale to The Imperial Tobacco Company of the whole business of Ogden's Limited (except its export business) as well as the English business of the American companies that had been operated through Ogden's Limited; the sale to the American companies of the whole American business of The Imperial Tobacco Company, Limited; and the formation of a new company called British-American Tobacco Company, Limited, to which the Imperial Company, the American companies and Ogden's Limited sold their business foreign to the United States and England. In the sale of the American companies to the Imperial Company was included the right to use in England the formulæ for manufacturing and the brands of the American companies; like sale was made of the formulæ and brands of the Imperial Company to the American companies so far as the United States was concerned; and the Imperial Company and the American companies made like sale of their formulæ and brands, so far as the world outside of England and the United States was concerned, to British-American Company. The American companies received an inconsiderable amount of stock in the Imperial Company, com-

(a) Record, Vol. II, pp. 59, 63.
(b) Record, Vol. II, p. 58.

pared with the total issued stock of that company, as being the value of their English property and business in excess of the American property and business of the Imperial Company. The Imperial Company received one-third of the common stock of the British-American Tobacco Company, and the American companies received two-thirds of such common stock; the American companies and the Imperial Company, in addition to the stock thus secured, subscribed and paid for in cash at par additional stock in the ratio of two shares by the American companies and one share by the Imperial Company, and so furnished the British-American Company cash with which it acquired factories and other tangible property useful in the export business and its working capital. The contract provided that the securities coming to the American companies should be distributed among them as they saw fit. As a part of the transaction, each of the vendor companies covenanted with the vendee companies respectively not to engage or be interested in the tobacco business in competition with that sold, and the vendee companies covenanted respectively with the vendor companies not to engage or be interested in the tobacco business in competition with that retained by the vendors respectively. It was provided that twelve of the Imperial Company's principal stockholders and directors should execute individual covenants similar to those executed by the Imperial Company, and that eight of the principal directors of the American companies should enter into covenants similar to those entered into by the American companies.

This whole transaction is shown by the contracts executed and the conveyances hereinbefore mentioned (a), and the circumstances are fully testified to either at the instance of the Government or at the instance of the defendants by every person who participated in the transaction, to wit: J. B. Duke (b),

(a) Record, Vol. I, pp. 111, 124, 134, 136.
(b) Record, Vol. IV, pp. 450, 459.

W. R. Harris (a), Thomas F. Ryan (b), W. W. Fuller (c) and J. B. Cobb (d).

Immediately upon the execution of these contracts in September, 1902, they were filed for public record in the place of public registry in England, and the substance of the contracts was immediately made public, and commented on by newspapers both in England and America(e). In the negotiations both sides were represented by counsel, The American Tobacco Company by American counsel, and The Imperial Tobacco Company, Limited, by an English solicitor (f). The whole contract is set out in the agreements filed as Exhibits to the Government's petition, and there were no side agreements, understandings or arrangements outside of the written and public documents (g). As soon after the signing of the contracts as possible, certainly by March, 1903, everything contemplated by them was done, the covenants provided to be given by individuals were immediately given, the transfers and conveyances were made after full taking of inventories, and there was paid to The Imperial Tobacco Company by British-American Tobacco Company, Limited, for tangible assets about $3,000,000, and paid to The American Tobacco Company for tangible assets nearly $2,500,000 (h). The British-American Tobacco Company, Limited, thus having tangible assets as well as the foreign right to all the brands of The Imperial Tobacco Company and the American companies, proceeded to do with its foreign business as it saw fit, forming companies with minority stockholders for the exploitation of brands in South Africa and other foreign countries (i).

(a) Record, Vol. IV, pp. 735, 743.
(b) Record, Vol. IV, pp. 720, 728.
(c) Record, Vol. IV, pp. 714, 720.
(d) Record, Vol. III, p. 34.
(e) Record, Vol. IV, pp. 718, 719.
(f) Record, Vol. IV, pp. 718, 719.
(g) Record, Vol. IV, pp. 718, 719.
(h) Record, Vol. IV, pp. 738, 740.
(i) Record, Vol. IV, p. 740.

The British-American Tobacco Company is engaged in business substantially all over the world, except in those countries in which the tobacco business is controlled by a Government monopoly. In pushing its trade it has adopted all sorts of trade getting methods. It employs Americans and Englishmen to a great extent, but seeks to induce its employees to learn the language of the country to which they are sent; it runs steamboats, and where necessary automobiles, and intelligently pushes the business. The great bulk of its business is in American grown leaf, and its efforts have been such that whereas there was a total exportation by it of American grown leaf (either in the shape of raw leaf or goods manufactured in America out of American grown leaf) of about 20,000,000 pounds in 1903, this amount had been increased to about 30,000,000 pounds in 1906 (a). It is true that experiments have from time to time been made by British-American Tobacco Company, Ltd., in the domestic leaf of various foreign countries (b), but the fact remains that the efforts of British-American Tobacco Company have been towards the popularization in foreign countries of manufactured tobacco and cigarettes which have for their raw material American grown leaf, and that its principal competition is against concerns using locally grown leaf (c).

The story of the activities of British American Tobacco Company in India, China and elsewhere; its meeting the problems of advertising and distribution, of currency fluctuations and other trade conditions, among peoples uncivilized or whose civilization differs substantially from American civilization, is graphically told by Mr. W. R. Harris, chairman of British American Tobacco Company, who was introduced as a Government witness (d). The

(a) Record, Vol. II, p. 72.
(b) Record, Vol. III, p. 442.
(c) Record, Vol. II, p. 74.
(d) Record, Vol. II, pp. 69 *et seq.*

story shows the almost insuperable difficulties of establishing a foreign trade, but difficulties that must be met if American industry is ever to establish a foreign trade. It shows as well, though, that these difficulties will never be overcome by the small individual manufacturer—they involve too much expense without any immediate return, and the necessity of too large an organization.

The effect of the activities of British American Tobacco Company has not been to make more difficult the doing of a foreign business by other tobacco manufacturers of the United States, but rather to make it easier for them to do a foreign business—the British American Tobacco Company has developed trade in India and China and other parts of the globe so that the American manufacturer who desires to go there will meet its competition undoubtedly, but will not be under the much harder necessity of breaking virgin soil (a).

In this whole record there is no suggestion of any act of unfair or unjust competition on the part of the British American Tobacco Company, and the British American Tobacco Company enjoys the unique position of having created a trade of great value to American leaf producers and American tobacco workers—a trade which, but for its activities and the activities of its predecessors in business, would not have existed at all. There was brought out by the Government the fact that an officer of The American Tobacco Company tried to ascertain if a competing concern had made a shipment of cigarettes to China, having in mind to notify British-American Tobacco Company of such, in order that British-American Tobacco Company should supply this demand which it had undoubtedly created (b). It nowhere appears that British-American Tobacco Company in any way received such information, or acted upon it if it did re-

(a) Record, Vol. II, p. 73.
(b) Record, Vol. II, p. 298.

ceive it, or that such action, if it had been taken, would have been the proper subject of criticism.

No attempt has been made in this summary to recount purchases of specific properties made by the various companies, but only to recount the various consolidations that have resulted in all the principal companies defendants. The testimony of the men who have had to do with these purchases is undisputed, that no purchase has been made except on the basis of an investment, and with the expectation that the particular factory bought would, without reference to general competitive conditions, be a profitable one (a). No control, direct or indirect, of any tobacco business has been acquired except by direct purchase of the manufacturing plant of such tobacco business, or the whole or a part of the capital stock of such business. No selling agencies are hinted at—no agreements as to maintenance of prices, or distribution of territory, but simply acquisitions involving changes in the ownership of property. Many factory buildings purchased have been closed, but always with a view of securing greater efficiency and economy of manufacture by consolidating its business into some factory then in operation or thereafter acquired; no business was bought with the view of discontinuing or letting it die (b). In the testimony of the president of The American Tobacco Company, James B. Duke, will be found a detailed statement of each purchase by The American Tobacco Company or other companies in whose management he was interested, with its circumstances and the motives which induced it, and in the testimony of Martin J. Condon, president of American Snuff Company, like testimony as to each purchase made by American Snuff Company.

(a) Record, Vol. IV, p. 362.
(b) Record, Vol. IV, p. 376.

III.—SPECIAL FEATURES EMPHASIZED BY THE GOVERNMENT OR BY THE DEFENDANTS, TO WIT.

(*a.*) *Concerted or independent action in the purchase of leaf.*

As said heretofore, one of the questions to be considered by the Court in this litigation is the effect of the organization and success of the defendant companies on leaf tobacco produced in this country. The testimony most helpful to the Court with respect to this is contained in the Government's Exhibit No. 76 (a), which consists of the estimate furnished by T. B. Yuille, of the leaf department of The American Tobacco Company, of the crops grown throughout the United States during the years 1903, 1904 and 1905, and statement of the actual purchases from such crops by The American Tobacco Company and companies in which it directly, or indirectly owns a majority or all of the capital stock. This testimony divides the tobacco raised in this country into ten classes grown in different sections of the country and varying in amounts of production from between 200,000,000 lbs. and 300,000,000 lbs. of the type known as the flue cured Virginia type to only 4,000,000 lbs. of the East Ohio air cured and fired. The sizes of the various crops vary from year to year, the total production of all the crops having varied in this period of three years from a maximum of 998,365,907 lbs. in 1903 to a minimum production of 842,145,183 lbs. in 1904. The flue cured Virginia type is grown principally in Virginia, North Carolina and South Carolina; it has very many grades or classes varying from each other in price more than the grades and classes of any other of these general types; it is used principally for smoking tobacco and cigarettes and to some extent in plug tobacco as well, and is exported as well as used in this country. The dark Virginia tobacco grows in Virginia around Petersburg, Farmville and Lynchburg;

(a) Record, Vol. V, p. 514.

about eighty per cent. of it is exported and what is used in this country is principally for snuff and smoking tobacco. The Virginia sun-cured type is a small general class that grows around Richmond; it is used substantially entirely for chewing tobacco, most of it in this country. The burley tobacco grows principally in Kentucky in the identical section famous as the "Blue Grass District," and its growth extends into Indiana, Ohio, West Virginia and Tennessee; it is used principally for plug tobacco and a form of tobacco that is both chewed and smoked, known as "plug cuts"; but little of it is exported. The Southern Kentucky and Upper Cumberland type is a comparatively small class, principally exported. The Green River tobacco grows in a section around Owensboro, Kentucky, and a good deal of it is exported, but such as is used in this country is used for smoking and chewing. The Dark Western is a dark, heavy tobacco that grows around Henderson, Kentucky, and Clarksville, Tennessee; most of it is exported, and so far as used in this country it is used for snuff. Seed Leaf Tobacco is a tobacco used in the manufacture of cigars and cheroots; it grows in various States of the Union, not otherwise engaged in the growing of tobacco; Georgia and Florida grow some grades or classes of it, and still different grades or classes are grown in Pennsylvania, Ohio, Connecticut, New York and Wisconsin. There is a small crop grown in Maryland, and a still smaller one that is called East Ohio air-cured and fired, but they are so small as to be negligible (a). The four principal crops grown are: The Virginia Flue-Cured; Burley; Dark Western, including the Henderson District; and Seed Leaf.

Tobacco is, and has for a long time been, sold in well-established but different methods; it is not a commodity which will ever lend itself to speculation on exchanges, as cotton and wheat do, because there are such differences between lots of even the

(a) Record, Vol. II, pp. 95–98.

same type, and these differences are so impossible to actually define, that with the same market conditions, buyers of equal skill and intelligence will differ substantially as to the value of a given lot. It must be actually seen, or actually sampled from comparatively small packages, to be bought.

The Virginia Flue-Cured is sold at warehouses. These warehouses are located in the various towns throughout the section that grows tobacco. The farmers bring their tobacco to a local market in wagons, or by train, and it is exposed for sale in loose piles, each pile graded by the farmer with a view to having uniformity of quality throughout the pile. These piles being exposed on the floor and subject to inspection by the buyers, are sold to the highest bidder. The auctioneer and owner of the warehouse are interested in securing as high a price for each pile of tobacco as possible, because the compensation of warehouses is fixed on a percentage basis, and warehouses themselves are in competition for the business of selling the farmers' tobacco (a).

These loose leaf warehouses, to which the farmers haul their tobacco, and where it is exposed to public sale, are confined principally to this flue-cured Virginia type. Burley tobacco, dark Kentucky fired tobacco, the Green River tobacco and the dark Virginia fired are sold differently. There are markets for these various types, in Lynchburg and Farmville for the dark Virginia, in Louisville and Cincinnati for the burley, in Owensboro for the Green River, in Henderson, Clarksville and other places for the Dark Kentucky fired. Many farmers have apparatus for pressing their tobacco into hogsheads, called "prizing," and the tobacco, when thus prized into hogsheads, holding approximately 1,000 lbs., is sent to one of these various markets and samples are drawn, and the various buyers in competition bid for the tobaccos represented by these samples. These markets are called "breaks," evidently be-

(a) Record, Vol. II, p. 131.

cause of the fact that there is a breaking of the package in order to draw the samples. The warehousemen on these breaks have the same kind of an interest in securing the highest possible prices for the tobacco sold in their houses, respectively, as the warehousemen, through whom are sold the Virginia flue-cured type—their pay for their services depends upon the amount received, and their continued success in business depends upon the farmers continuing to bring their tobacco to them for sale (a).

Under the custom obtaining in loose-leaf warehouses and on the breaks, farmers dissatisfied with the price obtained for a given hogshead, or a given pile of tobacco, may in a reasonable time decline to sell and so have his tobacco resold or withdraw it altogether (b).

While substantially all the tobacco sold by farmers is sold at auction in the Virginia and Southeastern sections, this is not true in the Kentucky and Tennessee sections or in the sections that raise seed-leaf. There has grown up in these sections a method of buying tobacco that involves a visit to various farms by representatives of the manufacturers, or of speculators, and the purchase by such representatives for future delivery of the round crop of the farmer. This practice was not inaugurated by The American Tobacco Company or any other of the defendants, but has grown up in the development of the business, being participated in by representatives of speculators, as well as representatives of large manufacturers (c). This method, even in the sections where it is followed, is not an exclusive method—even the large manufacturers buy at least half of their supplies on the large break markets, heretofore mentioned, and generally tobacco thus bought direct from farmers is not bought at lower prices than the same grades

(a) Record, Vol. II, pp. 182, 183.
(b) Record, Vol. IV, p. 263.
(c) Record, Vol. II, p. 181.

are bought on the breaks (a). The advantage to the manufacturer of buying from farmers is that the manufacturer does the packing himself and so escapes the possibility of being deceived in the quality of the samples drawn from the hogshead; and it gives to the farmer a convenient home market, saving him the cost of packing in hogsheads, shipping and such incidental expenses.

That there exists a real competition in buying tobacco is shown conclusively by an inspection of the Government Exhibits heretofore referred to (b), as well as by all the other testimony. It has been proved that The American Tobacco Company in its leaf buying organization does not act in co-operation with, but in independence of, the R. J. Reynolds Tobacco Company, Liipfert-Scales Company, D. H. Spencer & Sons, F. R. Penn Tobacco Company, Wells-Whitehead Tobacco Company, R. A. Patterson Tobacco Company, Nall & Williams Tobacco Company, W. S. Matthews & Sons, American Snuff Company, Standard Snuff Company and American Cigar Company (c); in addition, the total purchases by The American Tobacco Company *and* all of these companies, in 1903, amounted to only 391,000,000 out of 998,000,000 lbs.; in 1904, 329,000,000 lbs. out of 842,000,000 lbs., and in 1905, 418,000,000 lbs. out of 921,000,000 lbs. (d). All of the defendant companies, even if assumed to act in co-operation in their purchases of leaf tobacco, are not the sole purchasers of a single type; not a pound of their purchases is obtained otherwise than at the end of competition in which some of their competitors are participators, and some speculators, in whom they have no interest and with whom they have no relation (e).

The fact is that it would be a short-sighted policy

(a) Record, Vol. II, p. 183.

(b) Record, Vol. V, p. 514.

(c) Record, Vol. II, p. 135; Vol. II, pp. 188, 189; Vol. IV, p. 417.

(d) Record, Vol. V, p. 514.

(e) Record, Vol. II, pp. 131, 132.

on the part of The American Tobacco Company to attempt to control and lower the price that the farmer receives for his leaf tobacco. Leaf tobacco is only one of the products that farmers in leaf tobacco sections can grow. In North Carolina, South Carolina and Virginia it is grown on lands that may be profitably planted in cotton, and it is the policy of large farmers to raise at the same time cotton and tobacco, increasing or diminishing the acreage in the one or the other as price conditions make it to the interest of the farmer. In the Kentucky section, Blue Grass fields are broken up to raise Burley, and the same farmers raise the Blue Grass and live stock and Burley tobacco, varying their acreage as it is from time to time profitable to do so. Every section that grows tobacco grows also other crops, and it would be suicidal in tobacco manufacturers, even if they had the power, to put down the price of tobacco so that it could not stand in competition with these other crops. Another fact is not to be forgotten, and that is that there can be an over-supply produced on tobacco of any type. If tobacco becomes so high in price as to be out of relation to the other crops that the land will produce, such lands will gradually go into tobacco, and the over-supply will be diminished, and ultimately prevented, only by a reduction in price.

> "If there was only one buyer, that one buyer has got to pay the farmer a profit or he won't be able to buy it, and if you have competition enough to get the price too high then you will have a crop following the high prices so large that the price will have to go down because of that over supply. * * * I would rather have the price fixed at 12 cents a pound if we are to have it steady and uniform and you wouldn't have the ups and downs of the price, than to have it fixed at eight and drop to five and up to fourteen, because we can protect ourselves, the consumers and the dealer and everybody else better by having it stable and uniform. We are not speculating on our customers or on the farmer.

> We are doing a straight legitimate business and all we want is to get our raw material as cheap as anybody else and we don't care what that price is" (a).

No purchaser's "trust" will ever be successful in reducing the price of leaf tobacco until it combines the purchase not only of tobacco but of cotton, flax and other crops that will grow on the land; and no farmers' combination will ever be permanently successful until it includes thousands of acres that never, as yet, have been used for the growth of tobacco, but which are capable of such use. The purchaser who, with lack of competition, attempted to fix the price of his purchases too low would be only preparing the way for future abnormally high prices that he would have to pay for his leaf in order to stimulate its production; and the combination of farmers that attempted to advance the price of leaf tobacco beyond its fair proportion considered in relation to other crops that will grow on the land, would be certainly preparing the way for an abnormally low price that would ultimately be necessary in order to reduce to normal conditions the supply of the crop as compared with its demand.

A recognition of this condition has induced The American Tobacco Company, even with respect to companies in which it owns all the stock, to have such organizations to maintain their own leaf buying organizations, buying their leaf in real competition with The American Tobacco Company as well as other purchasers of leaf. The following is from the testimony of James B. Duke, the president of The American Tobacco Company:

> "Q. The American Tobacco Co. owns all the stock of the R. A. Patterson Tobacco Co. does it not?
>
> A. Yes.
>
> Q. And has for some while?
>
> A. Yes.
>
> Q. It also owns all the stock of the Nall & Williams Tobacco Co.?

(a) Record, Vol. IV, pp. 418, 420.

A. Yes.

Q. And has for some while?

A. Yes, sir.

Q. Do these two concerns buy their own leaf tobacco?

A. Yes.

Q. Is the competition that exists or is supposed to exist between them and the American Tobacco Co. real or feigned competition?

A. It is a real competition.

Q. Why doesn't the American Tobacco Co., owning as it does all the stock of these companies, buy the leaf tobacco for these concerns, and thereby eliminate the competition?

A. We don't want to; we don't object to competition. The farmer has got to have a good price for his tobacco or he won't grow it. If he grows too much the price goes down. Supply and demand regulates the price" (a).

The two companies mentioned, to wit: the R. A. Patterson Tobacco Company and the Nall & Williams Company had at the time they were acquired by The American Tobacco Company their own leaf buying organizations. There existed no legal reason for The American Tobacco Company not to take over such leaf buying organizations, but there existed no real business reason for The American Tobacco Company to close up these leaf buying organizations in view of the fact that they were equipped for the purchase of their requirements.

"Q. So unless there is some other reason than the mere elimination of competition the American Tobacco Co. permits leaf buying organizations in a company which it owns to go right along and buy?

A. Yes, sir" (b).

"Q. So far as the American Tobacco Co. itself buys for companies in which it owns stock it is for economy and efficiency in the buying and not to withdraw competition and get it lower?

"A. No" (c).

(a) Record, Vol. IV, p. 417.

(b) Record, Vol. IV, p. 420.

(c) Record, Vol. IV, p. 421.

In the great volume of testimony which has been introduced by the Government there has been nothing at all inconsistent with the testimony of the president of The American Tobacco Company already quoted or referred to. The American Tobacco Company is a large user of leaf tobacco and a large purchaser. It has representatives in the places where leaf tobacco is ordinarily sold and it has occasionally bought leaf for other companies in which it has been interested as a stockholder. On the other hand it has never engaged in pretended competition with any purchaser of tobacco, but its competition has been real and not feigned. *Counsel for the Government has had in his possession and has examined all the correspondence between The American Tobacco Company and each of the following companies, to wit: The Imperial Tobacco Company, Ltd.; R. J. Reynolds Tobacco Company, R. A. Patterson Tobacco Company, Nall & Williams Tobacco Company, American Snuff Company and the numerous companies in which these companies have an interest, and all the correspondence of the managers of the leaf departments with their local buyers and agents. It is safe to say that the correspondence between ordinary competitors, against whom no charge of combination or common interest has ever been brought, large buyers of the same product, would ordinarily contain quite as much discussion of that product, and prognostications as to its future prices, as is found in this record between these various companies.*

When one company has bought for another it has been openly and not secretly done, and has been plainly for economy and efficiency of buying and not to reduce prices by an elimination of competition. One example of this was the purchase of certain types of tobacco by American Snuff Company's organization for W. S. Mathews & Sons; American Snuff Company makes snuff of dark tobacco grown and marketed around Clarksville; in that section large quantities of tobacco are

bought direct from farmers as hereinbefore described. Since American Snuff Company used its tobaccos only to be ground into snuff, it was indifferent as to the length and general size of the leaf. But certain users of tobacco were anxious for long and well shaped leaves, and so tobacco of the same general type and grade was of an appreciably higher price when in leaves of the required length and general shape. Now, in its country buying, with the habit of purchasing round crops, American Snuff Company found itself more or less embarrassed as a competitor, because it had no use for the more expensive proportion of certain round crops purchased by it, whereas, if it could be assured that these grades not needed by it would be taken off its hands it would become a more willing bidder. W. S. Mathews & Sons used this same general type, produced in the same crops, that the American Snuff Company used, but preferred the longer and better shaped leaves, and American Snuff Company did its purchasing. This arrangement did not exist very long, not because of any apprehended illegality in it, and not because of any harm that it was doing producers of tobacco, but because the Mathews Company felt that its tobacco was costing it more than if it bought for its own account on the breaks. The following is quoted from the testimony of Martin J. Condon, president of American Snuff Company:

> "In buying a farmer's crop we could afford to go in and buy the crop and supply Mathews with what they wanted. We went into the country buying reluctantly because of the heavy expense, and that was really the final cause of the Mathews Company taking the purchases away from us, because they said the tobacco was costing them too much—that they could buy what they wanted cheaper on the breaks.
>
> Q. And so you quit buying for Mathews?
>
> A. Yes.
>
> Q. And thereafter you sold your stock in the Mathews Co.?

A. Yes.

Q. Did you begin buying for Mathews with a view of lessening the competition in the buying and the price that the farmer got?

A. No, and while we didn't do it for the benefit of the farmer exactly it was really a benefit to the farmer because it furnished additional competition which as a single bidder we could not furnish" (a).

Another quotation may be made from the testimony of the president of American Snuff Company, because it clearly states the attitude of American Snuff Company with reference to the purchase of leaf tobacco, an attitude not contradicted by or inconsistent with a syllable of testimony and that coincides exactly with the attitude of The American Tobacco Company as testified to by its President:

"Q. Is the American Snuff Co. in combination with or under the direction of the American Tobacco Co. in the purchasing of this tobacco? A. No, sir.

Q. Has it ever been? A. Never.

Q. Is it now or has it ever been in combination or in arrangement with, express or implied, or any sort, with the Imperial Tobacco Co.? A. No, sir.

Q. Is it now or has it ever been under any arrangement, express or implied, of any kind, with any Regie buyer or any other buyer? (Regie buyers are the purchasers of tobacco and leaf supplies for the Government monopolies that in some countries control the manufacture of tobacco: as France, Spain, Italy and Austria.)

A. No buyer, no combination, company, or no individual; there has never been any kind of arrangement; in fact, I never heard of such a thing until I heard the accusation made in the dark fired district that such a thing existed; never heard of the possibility of it even.

Q. Was there ever any understanding between the American Snuff Co. and any other buyer of tobacco that had the effect of lessening competition for the price paid, or a division of the territory?

(a) Record, Vol. IV, p. 521.

A. We never have entered into any kind of an agreement with anybody on earth the effect of which was the lessening of competition on the tobacco or in the tobacco that we used.

Q. Or the division of territory?

A. By the division of territory, or by any other means or by any other agreement. We have been absolutely independent of everybody in the purchase of our tobacco; we have bought it from the farmers in every way they have offered it." (a)

Another case of the purchase of tobacco by one company for another is the purchase by The American Tobacco Company of the leaf tobacco grown in America used by British-American Tobacco Company. By the contract of September 27, 1902, heretofore considered, the Imperial Tobacco Company reserved, and the British-American Tobacco Company was given, the right to purchase respectively its raw material in the United States. This right was given or reserved expressly because of the covenants heretofore referred to, given by the respective vendor and vendee companies, not to engage in business in competition with the business respectively bought or sold.

In this purchase of raw material in the United States there has existed just as keen competition between The American Tobacco Company and The Imperial Tobacco Company as if no kind of a contract had ever been made between them. This is as fully and definitely proven as any fact can be, and, notwithstanding the thorough investigation of letters, papers and documents by the Government, no doubt is thrown upon it (b). The strength of this proof is only increased, and by no means diminished by a consideration of the feebleness of the only circumstance suggested by the Government as militating against it. It appears that an officer or employee of The Imperial Tobacco Company, on a casual visit

(a) Vol. IV, p. 520.

(b) Record, Vol. II, pp. 119, 178; Vol. IV, pp. 261, 271, 290.

to New York, wrote a note to the president of The American Tobacco Company, complaining that some leaf buyer of The American Tobacco Company had been unfriendly and unfair to the Imperial Tobacco Company by purposely raising the price which the Imperial Tobacco Company was required to pay for a lot of leaf tobacco. The charge made by The Imperial Tobacco Company against The American Tobacco Company was a charge not of real competition, but of maliciously and by pretended bidding for tobacco that was not desired, raising its price; and an officer of The American Tobacco Company wrote to the Imperial Tobacco Company disclaiming such motive or such conduct. The circumstance was one that might well have occurred between any two competing manufacturers, and the conduct of The American Tobacco Company with respect to it would have been only decent conduct if the same matter had been brought to its attention by any other competitor (a). After the explanation given by the Government's witness, the Government's counsel appeared to make efforts to obtain the note that the officer of the Imperial had written to the president of The American Tobacco Company. From what is testified, it is likely that the note was a mere personal, pen-written note, and that it was sent by the President of The American Tobacco Company to the officer of The American Tobacco Company to whom the matter was referred, and it has been lost; at any rate, all efforts to find it were unsuccessful, and when the President of The American Tobacco Company himself went on the stand, he offered all of his correspondence to the inspection of the Government.

The English contract was made on September 27, 1902. The marketing of the tobacco crop is largely in the fall, and from September 27, 1902, until that crop was completely purchased, there was a necessity of frequent communication between The American Tobacco Company and The Imperial Tobacco

(a) Record, Vol. III, pp. 458, 459, 518, 519, 520.

Company because during that year The American Tobacco Company was buying (the arrangement having already been made) the leaf tobacco for Ogden's Limited, and The Imperial Tobacco Company buying the leaf tobacco for certain plants of British-American Tobacco Company. But from that time there has existed absolutely no understanding of any sort, and no communication was had.

> "Q. From the expiration of that year (the year 1903) has there ever been any joint interest between the Imperial and The American Tobacco Company at all? A. None whatever" (a).

The fact of the purchase by The American Tobacco Company of the requirements of The Imperial Tobacco Company of Perique tobacco, will not be noted as an exception to this statement. The Perique crop is the crop raised in one County of Louisiana; The American Tobacco Company, along with its purchases of Perique, purchased at the instance of The Imperial Tobacco Company, its requirements of Perique tobacco amounting to from $6,000 to $8,000 per year, whereas the total purchases of The Imperial Tobacco Company of American grown leaf amounted to between $4,000,000 and $5,000,000 a year (b).

Another condition exists with reference to the British American Tobacco Company and its purchases of leaf tobacco which should be discussed here. As heretofore stated, it was contemplated by the contract of September 27, 1902, that it, as the Imperial, should buy its own requirements of American grown tobacco. This was not only the provision of the contract, but it was in the actual contemplation of the parties (c).

British American Tobacco Company, at its organization, took over the large factories devoted by The American Tobacco Company to manufacturing goods

(a) Record, Vol. IV, p. 290.
(b) Record, Vol. IV, p. 294.
(c) Record, Vol. II, p. 63.

for export trade, and at the same time took over the factories of the Imperial Tobacco Company, located in England, which were engaged in supplying its export trade with manufactured goods. This transaction occurred in the fall of 1902 and arrangements for purchasing the leaf for their export factories by The American Tobacco Company and the Imperial Tobacco Company, respectively, during the crop year then pending were substantially consummated, so that during that crop year each of these respective companies, to wit, The American Tobacco Company and the Imperial Tobacco Company, made the purchases that would have been required for their export factories (a). In the meantime ways and means had to be considered for British American Tobacco Company to supply itself with its future needs of leaf tobacco. The American Tobacco Company had an organization of competent men, familiar with the types of tobacco needed for the export trade; they had warehouses suitable for the collection and storage of these tobaccos; so in the spring of 1903, British American Tobacco Company, made an agreement terminable at will whereby The American Tobacco Company was to purchase and store the tobaccos needed by British American Tobacco Company, at a price that would reimburse the American Tobacco Company for its cost, besides giving a small brokerage charge. The following are quotations from the testimony of W. R. Harris, Chairman of the British American Tobacco Company:

> "Q. Since the making of the contract in 1902 the American Co. has been purchasing the American grown tobacco used by the British American Co.?
>
> A. Yes, sir.
>
> Q. Is that provided for in the contract?
>
> A. No, sir; it is not.
>
> Q. Was it provided for in the negotiations preliminary to the contract?
>
> A. No, sir.

(a) Record, Vol. IV, pp. 289, 290.

Q. When was it provided for and how, if you know?

A. Well, when this gentleman that I spoke of a while ago, Mr. Owen, came over, around the latter part of December, 1902, to take the inventory of all the material that was to be transferred to the British American Co. the thing was discussed with him, and it was then that the arrangement was made by which the American Co. was to continue to buy the leaf that was needed for the export business, as it always had, on the basis of 1 1/4 per cent. commission.

Q. So the American Co. buys the leaf needed by the British American, the American grown leaf, charging it to the British American at cost, plus a commission of 1 1/4 per cent.?

A. Yes.

Q. And that is its compensation and commission?

A. Its profit.

Q. Had the American Co. been buying those same types of leaf up to the time of the formation of the British American Co.?

A. Yes, sir, the American has always bought the leaf that is needed for its export business, while it was in the export business, and when the British American came, it had to buy a little more, that is, it had to buy enough for the factory that the British American had in Bristol, England, and later for the different factories scattered all over the globe.

Q. Is the leaf buying organization an organization of expert men?

A. Yes, sir.

Q. Is training necessary, and time necessary, and familiarity necessary to make a tobacco buyer?

A. Oh, dear me, yes. It is a life study.

Q. And as I understand the American Tobacco Co. already had an organization buying this tobacco?

A. Yes, sir.

Q. The types necessary for making goods for export?

A. The organization was started around 1892, a couple of years or so after the formation of the American Tobacco Co.

Q. Before the formation of the British

American; that is, before September, 1902, it had gone on and bought these types of tobacco?

A. Yes.

Q. The Imperial had bought the types of tobacco it had used in its export business?

A. Yes, sir.

Q. These two concerns were in competition?

A. Yes, sir.

Q. After the formation of the British American, the American Tobacco Co. continued to buy the types that had been used in its export business?

A. Yes.

Q. And it took over from the Imperial its buying for its export business?

A. Yes, sir.

Q. So after the contract there were two competitors?

A. Yes" (a).

The largest purchases for British-American Tobaccco Company are purchases of the flue-cured Virginia type and the purchases by The American Tobacco Company of that type, including all purchases for British-American Tobacco Company, amounted to only 85,000,000 pounds in 1905 out of a total production during that year of that type of 204,000,000 pounds (b).

It must be evident when one looks at the entire transaction that this arrangement was not entered into with a view to a reduction in price to the farmers by the elimination of competition between these two large users of tobacco. The constant and consistent policy of The American Tobacco Company in permitting the existence of independent and competing leaf buying organizations, even in companies of which it is the entire owner; the advancing cost of leaf tobacco brought about by increased consumption, which advancing cost of tobacco has taken more than one hundred and fifty thousand acres from cotton into tobacco, notwithstanding the general tendency of the cotton market to advance (c),

(a) Record, Vol. II, pp. 63–65. 133.

(b) Gov. Ex. Nos. 20 and 76, Record, Vol. II, p. 125.

(c) Record, Vol. II, p. 124.

the giving of other sufficient reasons by officers of The American Tobacco Company and the British-American Tobacco Company—all of these considerations induce the belief that the arrangement by which The American Tobacco Company buys leaf for British-American Tobacco Company was induced by no purpose and has no effect to diminish the prices paid for the tobacco used by either, but was intended to accomplish the good which it has been testified it did accomplish, to wit, the giving to the British-American Tobacco Company the skill and experience of The American Tobacco Company's organization of buyers, and by reasonably compensating The American Tobacco Company for these services, enabling it to more economically operate its machinery of purchasing—including employees' salaries, expenses of storage and other such items.

These are the only cases of the purchase of tobacco by one company for another. It is not meant that The American Tobacco Company, American Snuff Company and American Cigar Company do not purchase leaf tobacco for separate companies that are merely departments of their business, respectively organized as separate corporations for business convenience, such as Blackwell's Durham Tobacco Company and Spaulding & Merrick in the case of The American Tobacco Company and The Havana American Company in the case of American Cigar Company; but there is no other company in which there is diversity of ownership or which is in any way conducted other than as a mere branch of the business of the stockholding company, for which any of the defendants purchase leaf tobacco; there are some companies, as has been heretofore noted, in which there is no diversity of ownership at all, which, nevertheless, maintain separate leaf buying organizations in an actual and *bona fide* competition with the leaf buying organization of the owning corporation.

The prices that farmers have received for their leaf tobacco and the actual practical conditions in the leaf markets of this country, and the increased acreage now under cultivation, fully justify the claims made by The American Tobacco Company and the other defendants that there has been nothing in their organization or success that has operated to the detriment of leaf tobacco producers. These defendants do not pretend to be philanthropic institutions, and they could not, if they desired, be of real benefit to farmers by paying them an unreasonably high price for their leaf. If they attempted it there would only result so large an oversupply without any increase in demand that entirely too much would be raised and the over-supply would be cut down to the basis of a normal demand only by a reduction in price. That would be so under all circumstances. As expressed by the President of The American Tobacco Company:

> "Q. How can any manufacturer aid the farmer towards getting a better price for his tobacco; is there any way except to increase the consumption of tobacco?
>
> A. That is the only way I know of.
>
> Q. And how can any manufacturer, large or small, hurt the farmer permanently so far as the price of his tobacco is concerned? Any other way excepting reducing the consumption?
>
> A. That is the only way I know. He might reduce the price temporarily this year, but he will lose that next year all he will gain. If the Government will guarantee us a price on tobacco it will be worth something; we will pay for that" (a).

The American Tobacco Company and the other defendants have aided the producers of tobacco in the only practical way. They have increased the consumption of tobacco so that notwithstanding an increased production in the types of leaf of which it uses most largely prices have increased. Much

(a) Record, Vol. IV, p. 418.

testimony is in the record confirming the foregoing statement as to the increase in price of leaf tobacco and the increase of consumption of types used largely by The American Tobacco Company, but, perhaps, no more succinct statement of these conditions and of the general advantages of an organization of the size and capital of The American Tobacco Company engaged permanently in the tobacco business, and with millions of securities depending upon that permanence, than the following quotation from the testimony of James B. Duke:

> "Q. You spoke of the tobacco business of this country having grown because of the advertising and pushing of the various brands. Has the growth of this granulated tobacco business had the effect of increasing or de creasing the price paid for leaf that goes into it?
>
> A. Increased it much.
>
> Q. What is the cost of your leaf going into Duke's Mixture as compared with 15 years ago?
>
> A. It is about double.
>
> Q. Is that true of the other grades that go in the granulated tobaccos?
>
> A. I think that Bull Durham grades are 33% higher. That has not advanced as much for the reason that the drop in paper cigarettes in this country made of that kind of tobacco has kept the demand for that kind of tobacco down so far as the cigarette business is concerned, and of course the large increased use of Bull Durham has taken up some of that.
>
> Q. Has there been an increase in the growth in North Carolina, South Carolina and Virginia in tobacco since the formation of The American Tobacco Co.?
>
> A. Very large.
>
> Q. To what crops were those lands devoted before the owners began to raise tobacco on them?
>
> A. Largely cotton.
>
> Q. What has induced the change from cotton to tobacco?

A. The price or profit, although the price of cotton is up, too; yet it is more profitable to grow tobacco, or they wouldn't grow it.

Q. Has that been because of the growth in granulated tobacco due to the efforts of manufacturers to push their brands or is part due to the growth of foreign business?

A. Both; I think the statistics gave the crop of North Carolina about 60,000,000 lbs. a year. There is about 200,000,000 lbs. a year now.

Q. 60,000,000 when?

A. In 1890.

Q. In the year The American Tobacco Co. was formed?

A. Yes, and for us now there is 200,000,000 lbs. grown. Farmers if they hadn't been paid wouldn't have increased the crop; they would have decreased it.

Q. How are the prices paid for North Carolina and Virginia and burley and other types of Kentucky tobacco compared with the prices 10 or 15 years ago?

A. I don't know enough about the prices of burley tobacco back that far, because the American Tobacco Co. were not very much in that kind that far back, but I know that the price of the tobacco that the Continental Tobacco Co., now the American Tobacco Co., use in their plug tobacco business costs more than it did before the Continental Co. was formed. It has increased right along.

Q. How do you know the American Tobacco Co. pays higher prices for its tobacco usedin its plug business than before the Continental Tobacco Co. was formed?

A. I know in 1895 we bought tobacco for Battle Ax, 3 and 3 1/2 cents per pound that we have to pay now 7 and 8 cents a pound.

Q. And has there been a corresponding increase in the other types of Kentucky tobacco as far as you know, and Virginia and North Carolina leaf too?

A. Some types have not increased so much probably, but that depends upon their use.

Q. Do you know of any exceptions to the rule as expressed in your opinion that could advance the use of the type of tobacco and advance the price paid for it?

A. Yes.

Q. You do know of exceptions or you do not?

A. No, I don't know of any exceptions to that.

Q. Of what advantage to the producer of tobacco has the American Tobacco Co. been other than increasing the price by aggressively pushing the sale of its brands?

A. They always stand there ready to buy it when they have it for sale, and they sell it now six months earlier than they used to and in all times we stand there with the money and give them the money for the tobacco.

Q. You mean to say that the American Tobacco Co. has the size, the capital and the organization to be a reliable steady bidder on the market?

A. Yes, whether they require the tobacco or not" (a).

These same views are well expressed by Martin J. Condon, President of the American Snuff Company:

"Has the effect of the aggressive work that the American Snuff Co. has put in the snuff business, increasing the consumption from about 14,000,000 pounds in 1900 to 23,000,000 pounds in 1907, had the effect of raising that price?

A. Oh, yes; because it just——

Q. Adds that much?

A. It is that much more to the consumption and demand.

Q. Could the American Snuff Co. or any manufacturer or any combination of manufacturers do any permanent good to the farmers, in your judgment, except by increasing the demand or the consumption?

A. No; I could not see any way that anything could be done to benefit them except that.

Q. Could any manufacturer or combination of manufacturers do anything to permanently injure the tobacco producers except to curtail that consumption?

A. No; because if their own demand kept up and they forced prices down on the farmer,

(a) Record, Vol. IV, pp. 421, 422.

he would simply turn his land into something else and he would not raise it and the next year they would find themselves short of supply. The farmer has got to receive a fair price for his tobacco or he simply don't raise it. Now, the manufacturer absolutely depends on him for his raw material, and he is certainly killing the goose that lays the golden egg when he puts the farmer in such a position that he won't raise what the manufacturer has to have.

Q. On the other hand, suppose by competition among the manufacturers or otherwise, there is a very high price paid for tobacco in comparison with what the other crops that grow on the land would bring?

A. Naturally the farmer then will put his land in tobacco when he is going to get a high price which is due solely and alone to the demand and supply, and when he increases the supply beyond the demand, why, then of course the price drops naturally.

Q. Until the equilibrium is established?

A. Yes, sir.

Q. And that is so whether there are many buyers or few buyers?

A. It doesn't make any difference" (a).

At the organization of American Snuff Company it took over from its respective vendors their stock of leaf tobacco bought for the manufacture of snuff, at cost. This represented, substantially, the prices for the year ending May, 1900, which was 4.58 cents per pound; the subsequent purchases are shown by the testimony of the head of the leaf department of American Snuff Company:

"Q. What were the averages for the entire purchases of American Snuff Co. for each year since?

A. For the year ending July 31, 1901, the average was 5.76; 1902, 5.50; 1903, 5.15; 1904, 4.26; 1905, 5.26; 1906, 5.94; 1907, 7.03.

Q. Do those figures represent the entire purchases of the American Snuff Co. or the

(a) Record, Vol. IV, pp. 522, 523.

purchases of the American Snuff Co. for the uses of the American Snuff Co.?

A. For the use of the American Snuff Co. only.

Q. Have those types of tobacco and qualities been of the same types and qualities that the vendor companies had that was taken over to the American Snuff Co. at its organization?

A. Yes, sir.

Q. I notice in one of them, to wit, the year ending 1904, July 31, 1904, and in that year only, the price was lower than the price for which you took over tobacco from your vendors; what was the reason for that?

A. It was a very common crop of tobacco, very ordinary tobacco, not useful for our purpose, and it was also a very large crop of tobacco, one of the largest crops ever grown in the United States.

Q. Was that the 1903 crop?

A. Yes.

Q. And this very large crop of very poor quality, to wit, the crop of 1903, had been the only crop that sold at a lower price than the tobacco in the hands of the vendors that was sold to the American Snuff Co.?

A. Yes.

Q. Mr. Christian, you have been familiar with the leaf business for some years previous to the formation of the American Snuff Co.?

A. Yes, sir.

Q. What is your judgment, as a tobacco man, as to how the prices of recent years compare with the years before the formation of the American Snuff Co.?

A. It is very much higher of recent years, from 50 to 100 per cent. higher at present than it was before the formation of the American Snuff Co." (a).

The effectiveness of this testimony and the strength of the position of the defendants consist in the reasonableness of it all. It so happens that this suit is pending while the prices of leaf tobacco are high, but there is no denying the fact

(a) Record, Vol. III, p. 229.

that they are sometimes low, and that some grades of a given type have sometimes an upward tendency, while other grades have a downward tendency. The truth must remain, though, that energetic efforts to sell the finished product not only in this country, but throughout the world, constitute the best service that can be rendered to producers of the raw material; and that such producers are benefited and not injured by the existence of a large, strong user of the raw material, depending for its very life on securing adequate supplies of such raw material, with capital in times of panic and other exigencies to bid a fair price for the raw material, and with the purpose, because essential to its very existence, of securing the production of an adequate supply of such suitable raw material.

(*b.*) *Ownership of stock in other companies by certain of the defendants, as distinguished from direct ownership of property.*

As already noted, The American Tobacco Company and the other defendants are in no sense holding companies. They are manufacturing companies, The American Tobacco Company making directly most of the cigarettes, manufactured tobacco and little cigars in which it is directly or indirectly interested (a), American Snuff Company making most of the snuff in which it is directly or indirectly interested (b), and American Cigar Company making most of the cigars in which it is directly or indirectly interested (c). Since 1899, however, these defendant companies, or some of them, have, for one reason or another, become holders of stocks of other companies.

The first instance was when The American Tobacco Company sold its large plug tobacco business

(a) Record, Vol. V, Govt.'s Exs. 77, 78, 79, 80, 81.
(b) Record, Vol. V, Govt.'s Ex. 82.
(c) Record, Vol. V, Govt.'s Ex. 83.

to Continental Tobacco Company, and took pay therefor in preferred and common stock of Continental Tobacco Company. It did not become the controlling stockholder, and its business was principally smoking tobacco and cigarettes, whereas the business of Continental Tobacco Company was principally plug tobacco (a).

The next transaction of this kind was when Continental Tobacco Company co-operated with R. J. Reynolds and his associates in the formation of the R. J. Reynolds Tobacco Company, with a capital stock at first of five million dollars, and now of seven and one-half million dollars, owned as to one-third thereof by R. J. Reynolds and his associates, and as to two-thirds by Continental Tobacco Company—now The American Tobacco Company. This is a typical instance of a class of cases in which some one of the defendant corporations owns stock in some other, and it would be well, therefore, to consider it carefully. It illustrates two theories that have run through the course of The American Tobacco Company, neither of which would ordinarily be condemned, but rather commended. These theories have been, first, that the men who conduct a business should be interested as part owners in the business actually conducted by them (b); and, second, that because of the peculiarities of the tobacco business, competitive conditions can never be eliminated, and that various effective organizations, though a majority of their stock is bought for investment by the same company, should be left to get business as they can; that these conflicting efforts stimulate the sale and consumption of tobacco, and are of benefit to all interested in increasing such sale or consumption (c). The following is a quotation from the testimony of the President of the American Tobacco Company with respect to this R. J. Reynolds Tobacco Company, and

(a) Record, Vol. IV, p. 430.
(b) Record, Vol. IV, p. 395.
(c) Record, Vol. IV, p. 394.

the reason that induced the acquisition by Continental Tobacco Company of part of its stock, and the way its business is conducted:

"Q. About the same time or a little thereafter the Continental Tobacco Co. acquired two-thirds of the stock of R. J. Reynolds Tobacco Co. and that company still exists as a separate corporation. State what the motives were of the Continental Tobacco Co. in making this acquisition and what its motives were in acquiring a part only and not all of the stock?

A. Mr. R. J. Reynolds is a very able tobacco merchant. After the Continental Tobacco Co. was formed he came up with the idea of selling his business to them. I personally told Reynolds that the Continental Tobacco Co. had no organization to manufacture, or that knew how to manufacture his style of goods and that I would not favor buying it unless he should stay and run it, and that I did not think he was the kind of a man to run a business that he had no interest in—a rich man. I told him we would take two-thirds of it at the price he named because I thought it was a good investment and manufactured an entirely different class of goods from what the Continental Tobacco Co. manufactured. They are sold in the Southern States and I did not consider they were in competition with the Continental Tobacco Co.'s plug because it is a different class of goods.

Q. Has that business been conducted in that way ever since?

A. Yes; very profitably and a very large business.

Q. Has its business increased or diminished since that transaction?

A. It is producing about five times as much as it did before we went into it.

Q. The Reynolds goods are a flat goods made principally of Virginia tobacco, are they not?

A. North Carolina and Virginia tobacco.

Q. And they are sold almost altogether in the Southern States?

A. Yes.

Q. Has the Continental Tobacco Co. and since the merger the American Tobacco Co. attempted to sell its goods in that same section?

A. Continually, and their predecessors ever since I can remember.

Q. Has the sale by the Continental Tobacco Co. and the American Tobacco Co. of its plug goods in that section increased or diminished since the purchase of Reynolds' stock in 1899?

A. All increased.

Q. Has it increased largely?

A. Well, in some of the Southwestern States where the northern and western immigration has gone in there where they have been in the habit of using sweet goods they have increased largely, but in some of the old parts of the South, like Virginia and North and South Carolina and Georgia, I don't think they have increased much.

Q. Has the presence of the Reynolds goods in those sections retarded the Continental Tobacco Co. in trying to get in there and introduce theirs?

A. No, sir.

Q. In going in and attempting to introduce the brands of the Continental Tobacco Co. and American Tobacco Co. have you attempted to withhold competition from Reynolds as against other people?

A. Not at all.

Q. Would it be possible to do so if you tried?

A. No.

Q. Who directs the affairs of the R. J. Reynolds Tobacco Co.?

A. R. J. Reynolds.

Q. Do you or does any other officer or employee of the American Tobacco Co. direct the affairs of that company at all?

A. No, sir.

Q. Have you ever done so?

A. No.

Q. How does he buy his leaf tobacco?

A. Independently on his own account.

Q. How does he sell his goods?

A. Independent and on his own account.

Q. His own selling organization?

A. Yes.

Q. Where does Reynolds live?
A. In Winston, North Carolina.
Q. Is that where the general offices of his company are?
A. Yes, sir.
Q. And is it from there that his selling is done?
A. Yes.
Q. Are you a director in the R. J. Reynolds Tobacco Co?
A. I don't know.
Q. Do you know whether you ever were a director?
A. I believe I was originally.
Q. Did you ever attend a meeting?
A. I think probably I have in New York here sometime when they needed a quorum; I don't know, though.
Q. Did you ever have anything to do with the direction of that company, whether a director or not?
A. No; I have talked to Reynolds about his business and always told him, 'you run it any way you like.'
Q. He has done so?
A. Yes" (a).

Of this same class, besides the supply and merchandising companies heretofore discussed, are American Cigar Company as related to The American Tobacco Company, American Snuff Company as related to The American Tobacco Company, (though it is hard to see the competition that would exist between these companies under any possible conditions) Liipfert Scales Company as related to the R. J. Reynolds Tobacco Company, W. S. Matthews & Sons as related to British-American Tobacco Company, Limited; Porto Rican-American Tobacco Company as related to The American Tobacco Company and American Cigar Company; and tobacco manufacturers in the United States, as follows: Pinkerton Tobacco Company, F. R. Penn Tobacco Company, R. P. Richardson, Jr., & Company, and John W. Carroll Tobacco Company, in each of which The American Tobacco Company holds stock.

(a) Record, Vol. IV, pp. 384–386.

There are two other companies in which The American Tobacco Company is also a part owner, the reasons for which relation of partial ownership is not the same as has heretofore been stated with respect to the R. J. Reynolds Tobacco Company. The first is P. Lorillard Company. It was one of the old tobacco manufacturing concerns, with a capitalization, authorized and issued before 1899, of five million dollars, of which three million dollars is common stock and two million dollars is eight per cent. preferred stock. The common stock was held closely by the Lorillard family, but the preferred stock was more or less widely distributed. Continental Tobacco Company, at its organization, acquired all the common stock, and soon after its organization offered to procure the outstanding preferred stock by the issuance of its five-year notes. This offer was accepted by the holders of more than two-thirds of this preferred stock, and there exists no legal reason under the laws of New Jersey why the P. Lorillard Company should not be voluntarily liquidated. But, in the meantime, P. Lorillard Company having its large factories completely equipped, and having its goods marketed, first by Continental Tobacco Company and then by The American Tobacco Company, has become more and more prosperous—its own earnings are so much more than sufficient to pay the dividend on its preferred stock that the preferred stock is normally worth much more than par. It has been conducted as a separate corporation solely for the benefit of these preferred stockholders, and in order to avoid a liquidation in which they would receive only par for a security reasonably worth more than par (a). Surely such regard for the real, instead of the technical, rights of security holders is not to be condemned. The other company in which there is still a partial ownership of stock by The American Tobacco Company is the John Bollman Company of San Francisco. This company for many years has

(a) Record, Vol. II, p. 418.

manufactured cigarettes whose principal sale is on the Pacific Coast, and not in competition with cigarettes manufactured by The American Tobacco Company, unless, indeed, there may be said to exist competition between all forms of tobacco. The motives which induced the purchase of an interest in this business, but not the whole business, were identical with the motives that induced the purchase of an interest in the R. J. Reynolds Tobacco Company. The John Bollman Tobacco Company was in the hands of a Mr. Gutschow, a capable man, the owner of the business, who had built it up to be a profitable business. He was left to operate it just as independently as R. J. Reynolds has operated his business. But an offer was made to Mr. Gutschow of employment in Germany, and he desired to accept the employment, but desired to retain his stock in The John Bollman Company. He did so, and The John Bollman Company has since been operated really as a branch of The American Tobacco Company, but so profitably that Mr. Gutschow has never desired to sell his stock (a).

There have been other companies in which The American Tobacco Company attempted to carry out its policy of having the men active in the business have an interest in the property and profits, of which The American Tobacco Company has, for one reason or another, become the sole owner, although the corporations continue in their independent conduct and operation. One of these is F. F. Adams Tobacco Company at Milwaukee, Wisconsin, which manufactures and sells tobacco, having its principal sale locally near Milwaukee. Continental Tobacco Company acquired seventy-five per cent. of the stock, leaving the other twenty-five per cent. in the hands of those engaged actively in conducting the affairs of the corporation, but taking an option to purchase this twenty-five per cent. at any time during two years. The original owner of the business had become an old man, and the option was ex-

(a) Record, Vol. IV, p. 391.

ercised, and the balance of the stock purchased, although the same organization has conducted the business (a). Luhrman & Wilbern Tobacco Company was organized in 1899 to acquire a scrap tobacco factory theretofore operated by a firm called Luhrman & Wilbern. This was the entry of The American Tobacco Company into the business of manufacturing scrap tobacco. It was not pleased with the parties in actual conduct of the business, and so bought their stock (b). R. A. Patterson Tobacco Company and Nall & Williams Tobacco Company are other companies in which The American Tobacco Company at first bought an interest with a *bona fide* intention of leaving to the working organization a stock interest and afterwards became the actual owner of all the stock, although leaving in the hands of the original managers of the business the active management, with only the general direction to make money and increase business (c).

There is still another class of corporations in which the American Tobacco Company and other defendants own stock and never had any associate stockholders. The American Tobacco Company owns all the stock of S. Anargyros, Blackwell's Durham Tobacco Company, Butler-Butler, Incorporated, Day and Night Tobacco Company, London Cigarette Company, Limited, Manhattan Briar Pipe Company, Nashville Tobacco Works, Spaulding & Merrick and the Wells-Whitehead Tobacco Company, and always has owned the stocks of these respective companies since their organization or reorganization. American Cigar Company, in a like way, owns all the stock of Havana-American Company, and American Snuff Company all the stock of H. Bolander, Devoe Snuff Company and Standard Snuff Company. All of these companies are simply organized departments of the respective

(a) Record, Vol. IV, p. 389.
(b) Record, Vol. IV, pp. 386, 387.
(c) Record, Vol. IV, p. 396.

owning corporations for the conduct of its business. It is conceivable that such organizations are unnecessary, and that the business might be effectively accomplished by simple departments, but surely the policy of the law is not interested in men adopting in their business enterprises such methods if they think them best fitted to achieve such business enterprises.

Take Blackwell's Durham Tobacco Company as a typical case: The old Blackwell's Durham Tobacco Company had been a company with large trade connections and trade reputation. It had a factory at Durham, North Carolina, and trade all over the United States. The American Tobacco Company desired to become the purchaser of this manufacturing establishment. It regarded the name "Blackwell's Durham Tobacco Company" as having great value. It did not desire to make any change on the label of the goods, as would be necessary if The American Tobacco Company became the legal owner of its brands. Blackwell's Durham Tobacco Company besides had a different selling plan from that used by The American Tobacco Company, and there appeared to be no reason to take any of the danger incident to changing. So The American Tobacco Company caused the formation of a corporation called Blackwell's Durham Tobacco Company and it made the purchase, The American Tobacco Company furnishing to it the necessary funds and taking the issue or transfer of all its stock. There is nothing criminal in this—no consumer was deceived by the adoption of this method—the tobacco continued to be manufactured under the same formulæ and processes as it had always been, with a great many of the old employees still at work (a). The laws of the State of incorporation of Blackwell's Durham Tobacco Company and of The American Tobacco Company permit the holding of stock

(a) Record, Vol. IV, p. 388.

by one corporation in another (a). There was no possibility of combination because The American Tobacco Company was the only person affected. It was simply an effective way to enjoy the full fruits of the purchase.

This case of Blackwell's Durham Tobacco Company is but typical of the other companies in which The American Tobacco Company owns all the stock. It prefers to have these properties in the hands of separate corporations, believing that in this way it can best maintain the value of the good-will purchased, and also best develop the tobacco business as a whole by having particular men interested as presidents, vice-presidents and secretaries rather than department managers or assistant managers.

(c.) *Methods of competition practiced by defendants.*

As hereinbefore stated, the manufacture and distribution of tobacco is a business that stands alone among mercantile businesses. Every manufacturer of tobacco uses one type or another of leaf tobacco as his raw material; these types, with their several grades each, are so variable and so slight in their variations, that the selection of leaf tobacco is an important element in the tobacco manufacturing business. The treatment of this tobacco, the various processes of manufacture, the application of flavoring, are all intricate (b).

When the goods are manufactured, they must be named, packed and labeled so as to attract purchasers. Many a brand of tobacco has achieved its success by virtue of a happy name or an attractive package, and many have failed to succeed because there was nothing sufficiently attractive in the exterior to induce consumers to even try the qualities of the goods.

Still another thing not to be disregarded by the

(a) Corporation Act of New Jersey.
(b) Record, Vol. IV, p. 355.

manufacturer is the necessity of maintaining an identity in his product. The man who has become accustomed to the chewing of tobacco largely made up of burley leaf does not desire to find it changed to Green River leaf, although Green River leaf may be the more expensive. If a brand acquires popularity every effort of its manufacturer is to preserve its qualities, whether they be good or bad (a).

After the manufacture of tobacco there is involved its distribution. This is not a matter, either, that can be overlooked by any tobacco business. Though the manufacturer makes goods that when properly brought to the attention of a number of consumers would be popular, and though he puts them into packages and gives the tobacco a name that is calculated to favorably dispose a consumer to the product, and though he takes means to preserve the identity of his product, there exists the necessity of securing a proper distribution in order to popularize the brand. There are more than 600,000 stores in the United States from which consumers buy tobacco (b). The tobacco must be gotten into these stores. Consumers will not go or send to the factories for it. Some manufacturing establishments do business directly with these retail dealers, but in general the retail stores are supplied by jobbers, of whom there are in the United States more than five thousand that sell tobacco and the products of tobacco (c). The tobacco manufacturer disposes of his product to the jobber, the jobber in his turn to the retailer, and the retailer in his turn to the consumer.

There are difficulties, of course, in establishing a brand of tobacco; they are by no means insuperable, as evidenced by the fact that old manufacturers are constantly projecting new brands and new manufacturers are constantly coming into the field. Such difficulties as exist are compensated by the

(a) Record, Vol. IV, p. 441.
(b) Record, Vol. II, p. 363.
(c) Record, Vol. II, p. 364.

value of the brand after it has become once established. A consumer who has become fond of "Bull Durham" tobacco, for example, naturally asks for "Bull Durham" tobacco; he does not have to pay but five cents for it, and when it comes to the matter of satisfying his taste, he is not attracted to an article called "just as good" for four cents; the package suits his pocket and so he is not induced to buy another kind of tobacco simply because it is in a larger package for the same price. His habit is a "Bull Durham" habit and not a mere tobacco habit (a).

Of course, intelligent manufacturers realize that there is a percentage of consumers influenced by the retail dealer. If the retail dealer suggests that some new tobacco is better than the brand that the consumer asked for he may take it; and some retail dealers are influenced by jobbers and their salesmen to put into their stores and attempt to sell to their customers an unknown brand.

After all, though, the easy and natural course of business is for the consumer to ask for the particular tobacco he desires, and for the retail dealer to furnish him, without hesitation, just what he asks for; this becomes the easy course for the retail dealer, and it gives him the valuable reputation of furnishing what his customers desire.

The consumer must be gotten to ask for a particular brand, and the methods of manufacturers in building a brand have not been better told than in the testimony of Fred C. Peper, an independent tobacco manufacturer, having no relation whatever with any of the defendants:

> "Q. Who is the boss of the tobacco business, the jobber, retailer or the consumer?
>
> A. The consumer all the time: he makes the demand and the retailer and the wholesaler have to comply with it.
>
> Q. If you desired to extend any one of your brands in a given section or to popularize your brand, how do you go about it.

(a) Record, Vol. IV, p. 647.

A. We advertise the brand and we go to the consumer and get him interested in it, and give him a sample; when he gets that sample we will tell him to take the tag from the sample, keep it and put it in your pocket so that you won't forget the brand, and then after he once gets a taste of it he will probably fall into the brand. Some of our advertisers will go to work and say to them if you will bring me all the tobacco you have in your pocket of any other brand—I don't care what manufacturer makes it—I will give you twice as much for it of our tobocco. The reason of it is to get the tobacco of the others out of the pockets of the consumer in order to replace it with ours and have our tobacco chewed.

Q. And those methods are adopted to popularize the brands?

A. With us, yes, sir.

Q. And then do you send what are known as missionary workers to the trade?

A. To the retailers.

Q. And you work from the consumer to the jobber?

A. Through the retailer.

Q. Would it be practical to build the tobacco business up by working from the jobber down to the consumer?

A. No; the jobber would not buy it unless he had a demand for the goods from the retailer, and the retailer would not buy it unless he had a demand from the consumer" (a).

The methods of competition followed by The American Tobacco Company have been followed in recognition of these characteristics of the tobacco business—characteristics which it did not create, but which it is compelled to recognize if it is to succeed at all. The effects of these methods of competition are to stimulate and increase the consumption of tobacco, and they ought to be and are followed by even those manufacturers which secure in given sections monopolies of the tobacco business of their particular type. As Mr. Peper expresses it, "It in-

(a) Record, Vol. IV, p. 647.

" creases consumption. We make new chewers all " the time; we give men our advertising; we give " men tobacco that don't chew tobacco, and they " put it in their pocket and nibble at it and gradu- " ally they get to chewing it, and we have got them " for a time anyway " (a).

When one considers these methods followed by The American Tobacco Company and other tobacco manufacturers, it becomes evident that so far as the public interest is concerned in its buying of tobacco products there would be no catastrophe if the tobacco business fell into the hands of one single intelligent organization. Unless there is effort constantly expended by the manufacturer in advertising, sampling and pushing his goods the business will diminish, and if constant effort is made it is made on individual brands without reference to the manufacturer of those brands. The competition between The American Tobacco Company and the R. J. Reynolds Tobacco Company, for instance, or between different departments of the American Tobacco Company itself, is just as severe as between manufacturers which are differently owned in their entirety (b). This must in the nature of things be so. The manufacturer who puts out no new brands of tobacco, and gives no push and stimulus to any brand that is out, will find his business drying up or leaving him for more aggressive and enterprising manufacturers; and yet, if he does get out a new brand and tries to stimulate its consumption, he will inevitably find that some of the consumers, induced to consume that brand by this extra effort, are thereby taken from some one of his other brands (c). It is impossible for any tobacco manufacturer in an aggressive campaign on a given brand in a given section to single out the consumers of brands of other manufacturers from consumers of his own brand; his

(a) Record, Vol. IV, p. 648.
(b) Record, Vol. IV, pp. 396–397; Vol. II, pp. 393, 693.
(c) Record, Vol. IV, pp. 396–397; Vol. II, pp. 393, 693.

efforts will be directed toward the whole male population, including indiscriminately those who have been accustomed to consume the products of other manufacturers, those who have been accustomed to consume his own products, and those who have not consumed that class of tobacco at all.

In this way there is constantly going on a stirring up of the field of tobacco consumption, involving frequent interruptions of the tendency of men to consume the identical brands of tobacco to which they have become accustomed. Men that have smoked granulated tobacco have been brought to change and smoke plug cuts, and *vice versa;* men that chew fine cuts have been brought to chew plug and *vice versa;* men that consume tobacco made of Virginia and North Carolina leaf have been brought to consume a tobacco made of burley, and *vice versa.* Every brand of tobacco is worked for its own account and that manufacturer would be foolish, and soon a failure, who adopted any other plan of merchandising his goods than is involved in the recognition of that fact.

The American Tobacco Company has succeeded because it has recognized the value of tobacco manufacturing plants, processes and brands that were for sale, and that had about them the elements of great popularity and success, and so has invested in these brands, and thereafter has given them such advertisement and distribution as to bring them the popularity and success to which they were entitled.

These methods of advertising and stimulating the consumption of various brands of tobacco, not only operate to increase the consumption of the brands so directly involved, but such methods tend to increase the consumption of other brands of a like general kind that sell in the community where the work is done. Mr. Peper, in testimony already quoted, illustrates this, and there are other illustrations all through the testimony that nothing injures

the general tobacco business so much as cessation of these very methods that are ordinarily deemed competitive. The following is a quotation from Mr. Duke's testimony, following his statement that "Bull Durham" is, and has always sold to the consumer at one ounce for five cents, whereas "Duke's Mixture" goes to the consumer in a package of one and two-thirds ounces for five cents. They are both granulated tobaccos, and both sell substantially all over the United States:

> "Q. Is the Bull Durham business injured by the aggressiveness with which the American Tobacco Co. or other manufacturers push one and two-third ounce goods or two ounce or two and a half ounce?
>
> A. Bull Durham has been increasing since they have been pushing that. The sale on Bull Durham is twelve million a year and when we got it two and a half to three million a year, and in that time we have quadrupled the sale of Duke's Mixture (a).
>
> Q. How about going to the consumer with a larger package for five cents; does that dislodge a brand?
>
> A. We are doing that all the time ourselves. It don't hurt the sale of Star tobacco for us to put out a brand and sell 20 cents a pound less to the consumer. If I wanted to fight Star tobacco I would rather put out a brand and charge 60 cents rather than 50 and the consumer would think he was getting something better and might be getting it out of one pile.
>
> Q. Why is that?
>
> A. That is the human nature of the thing which I can't explain any better than you can.
>
> Q. The man who buys tobacco wants his taste satisfied?
>
> A. Yes (b).
>
> Q. Mr. Duke, you spoke of the growth of the businesses by reason of competition, and you mentioned Duke's Mixture and Bull Durham as an example. Was and has it been

(a) Record, Vol. IV, p. 439.
(b) Record, Vol. IV, p. 441.

your observation and experience of the tobacco business that businesses do grow in the heat of competition more than when there is a lack of competition?

A. Yes; make more money on it.

Q. Mention if you can some instances in your experience where this has been shown conspicuously?

A. Well, take the Blackwell's Durham and Duke's Mixture. When we started Duke's Mixture in 1886, Duke Sons & Co. did, it was sold two ounces for five cents. Bull Durham was selling two ounces for ten cents. They had a market about 3,000,000 pounds a year for Bull Durham. We pushed Duke's Mixture right straight ahead and for ten years we lost money on it. In 1896 it commenced to pay a profit; we carried the business on up and I think it ran up to 17 or 18 million pounds a year. Blackwell's Durham we brought up last year to over 12,000,000 a year.

Q. Now, during this time that Duke's Mixture was being sold at a loss was it hurting Blackwell's Durham at all?

A. No, it was making consumers, getting consumers to buy. It helped Blackwell's Durham. I don't believe there was 4,000,000 pounds of granulated tobacco sold in the United States when we started Duke's Mixture in 1886. The American Tobacco Co. sells 35,000,000 pounds of it now.

Q. Do you attribute a great part of that increase to the activity and advertising of the various competing brands?

A. Yes, sir.

Q. What, in your judgment, would have been the condition of granulated business in this country if there had not been active competitive work done on it?

A. I don't think there would have been 2,000,000 pounds a year sold.

Q. Does the cigarette business furnish an illustration of this decline of business when there is lack of aggressive competitive methods in selling?

A. Yes; we carried the cigarette business of the American Tobacco Co. up to about four thousand million a year and they kept

trying to pass so many of these laws all over the country that we sort of let up on our activity to push the cigarette business and pushed other lines of tobacco, and that business went down to somewhere around two thousand millions a year.

Q. About cut in two?

A. Yes. After that we got into the Turkish cigarette business and it is growing again. Last year we increased six or seven hundred million and the cigarette business last year is the largest in the history of the business. That is all by work, pushing, advertising and attracting people's attention to it.

Q. So in your judgment does the aggressive methods adopted by the American Tobacco Co. and other mannfacturers of tobacco really injure competing brands of tobacco?

A. No; I think it builds them. Take Seal of North Californa plug, going back fifteen years ago, Marburg Bros. had gone and established a large sale on that, and after we bought that business we continued it and there came out a brand Mastiff, made by Pace Co. of Richmond, and they advertised and pushed their brand, and while they did it we pushed and advertised Seal and the trade went away up, and they withdrew and they didn't make money on their brand, and when they stopped why Seal went down too. It would have paid us to have actually subsidized them to have gone on and fought us; we would have made more money by it.

Q. Has the experience which you have just given which was favorable to the American Tobacco Co. been duplicated in cases where you fought and used aggressive methods to get a business and seen the brand you were competing with grow?

A. Yes.

Q. Can you give an illustration of that?

A. Well, you take for instance, before Duke Sons & Co. went into the cigarette business, we were making Duke's Durham; Blackwell was making Blackwell's Durham, and as long as Blackwell had us competing with him their trade kept growing. We got off in the cigarette business and stopped pushing Duke's

Durham so much and the trade on Blackwell's Durham commenced to drag.

Q. Then you waked up again on Duke's Mixture and then Blackwell's Durham waked up and grew?

A. Yes, sir.

Q. In short, in your judgment as a tobacco man, is it true that you can crush competitors by selling goods below cost or free sampling and all those methods set out in the bill?

A. No, it is ridiculous. There is old Christian Peper's business in St. Louis, one of the oldest sweet plug concerns in the country; since the American Tobacco Company and Continental Tobacco Company has had this business there it has grown right along. We can't stop their trade and they can't stop ours.

Q. How about Schinasi's cigarette business?

A. We have made his business by pushing Turkish cigarettes. If it hadn't been for The American Tobacco Company and Anargyros pushing their cigarettes the way they have Schinasi wouldn't sell half what he does. He knows it. I saw him awhile ago and said, Why don't you advertise and push this along? He says there is no use; the American Tobacco Co. does that, and I get as much benefit out of it as they do; and he does, too" (a).

This quality of the tobacco business, that it grows with fierceness of competition among manufacturers, and that efforts expended in extending the sale and consumption of a given brand have a decided influence in extending the sale and consumption of brands of a like general kind, constitutes one of the interesting phases of the tobacco business, and itself affords a defense to the defendants against many of the allegations of the bill.

Considering the long life and extensive business activities of the defendants, the characteristics of the tobacco business which lend themselves to sharp competition, and the exhaustive investigation made by the Government for every smallest bit of evi-

(a) Record, Vol. IV, pp. 397, 398, 399.

dence of unfair or oppressive methods, the instances of alleged attempts by defendants to crush the business of competitors by selling goods below cost, or in some such other way, are notably few:

(1) Previous to the organization of the American Snuff Company, Weyman & Company had a large part of the business on a kind of snuff sold principally in the Northwest, and that is consumed like chewing tobacco. American Snuff Company got out a brand of like general kind and proceeded to attempt to make it popular in that same section. It resorted to sampling by mail, getting from county officers names of all voters in a given section and then mailing samples to those thought by their names to be Swedes. These and other methods were followed by American Snuff Company from the latter part of 1901 or the first part if 1902 until 1905. Undoubtedly these methods had involved greater expenditure than the business had earned, and so there was involved the sale of goods below cost. In 1905 it purchased the Weyman business, and the Weyman business had in the meantime grown from five hundred thousand pounds to over nine hundred thousand pounds (a). American Snuff Company has proceeded with the same methods in the same section, with the result that this business, purchased in 1905 from Weyman, is now a business of about two million pounds per annum (b).

(2) There is alleged an effort by American Snuff Company to crush the business of the Byfield Snuff Company by the introduction and sale in that territory of a brand called "Checkerberry," which, as testified to in some detail, is sold at a loss by American Snuff Company (c). The president of American Snuff Company testified with respect to this:

> "Q. Was Checkerberry gotten out with a view of crushing the Byfield Snuff Company?

(a) Record, Vol. IV, pp. 508, 509.
(b) Record, Vol. IV, p. 510.
(c) Record, Vol. III, pp. 212, 213.

A. No, no. We being in the snuff business undertake to make every kind of snuff that the consumer wants, and we had been making this before Checkerberry was put out. We had been making that wintergreen snuff just because we had endeavored to make every kind of snuff that we know of for which there is a demand, and we simply did it to increase our snuff business and not to run anybody out, and we find we can increase our business very well, not only not running the other fellow out, but increase his business as we did in this man's case.

Q. Did you have an idea in putting on your scheme by selling and securing the consumption of Checkerberry of so hurting the Byfield that you would coerce them into selling out?

A. No; our system was very largely on sampling order or free goods order, so that it was a matter of educating their taste up to our kind of snuff, and that sampling had the same effect there that our work did in Weyman's territory from 1901 to 1905, the time we bought him out.

Q. That is, it had increased the output of Weyman?

A. It increased the consumption of that character of goods and the brand that had the largest percentage of the trade took the biggest part of increase" (a).

The unadorned figures show in this case also the effect of this kind of competition on a given product. "Checkerberry" snuff was gotten out by American Snuff Company in 1904, and the output of the Byfield Snuff Company, beginning in 1903, was as follows:

1903.....110,758 pounds,
1904.....125,859 pounds,
1905.....130,826 pounds,
1906.....140,500 pounds,
1907.....152,500 pounds, (b),

(a) Record, Vol. IV, p. 511.
(b) Record, Vol. IV, p. 512.

and a travelling representative of the Byfield Snuff Company testified that it had not sold any goods at or below cost (a).

(3) It is said that the American Tobacco Company, taking advantage of a company whose connection with it was not known, and with a purpose of freezing out and coercing into a willingness to sell, other manufacturers of scrap tobacco, early in 1906, advanced the price of the raw material, and at the same time reduced the price of manufactured scrap goods, so that no scrap manufacturer could exist. The business of manufacturing scrap tobacco is comparatively a new business. It was begun undoubtedly by cigar manufacturers who were attempting thereby to utilize the clippings that came from the manufacture of cigars. The business has grown very rapidly in the last few years. It is very evident that a proper raw material for it is not only the clippings that come from the manufacture of cigars, but leaf suitable for the manufacture of cigars easily reducible to the size of such clippings. That much of this leaf is used as the raw material for scrap tobacco is shown by the evidence of the Government that the output of scrap tobacco is about 40,000,000 pounds per year, while the output of clippings is only about 18,000,000 pounds (b). Early in 1906 The American Tobacco Company did from time to time advance its bid for cigar clippings to various cigar manufacturers until the bid reached a high figure. Not by any efforts of any of the defendants, but by conditions such as ordinarily affect the leaf market, the price of cigar leaf such as would be used for raw material for scrap tobacco, had already advanced so that there was no surprise on the part of anybody that the price of clippings should advance as well (c). Walter J. Friedlander, who was at the time a leading independent scrap

(a) Record, Vol. IV, p. 313.
(b) Record, Vol. III, p. 248.
(c) Record, Vol. IV, pp. 80-81.

manufacturer, and who, it is suggested by the Government, was the manufacturer that this method of competition was intended to destroy, testified:

> "Q. And were you surprised at that advance in clippings or cuttings? A. I was surprised that it went to 22 cents. We expected that it would go to 17 or 18 cents in 1905" (a).

The president of The American Tobacco Company, in his examination, explained the advance in the price of cuttings, and also explained what is alleged to have been an additional measure to coerce the independent manufacturers to sell out, to wit: an increase in the size of the package of scrap tobacco sold to consumers and a consequent reduction of price.

> "Q. Did you know anything about the so-called scrap fight conducted in Cincinnati about a year ago or more, involving the raising of the price of clippings or cuttings, the raw material for scrap?
>
> A. There was no scrap fight. For the past five years I have heard of the enormous increase in the consumption of scrap tobacco. Once in a while I would see our people and notice our scrap hadn't increased very much and I would get after them and say, Why, we were not getting our share of the increase. They said they couldn't get cuttings enough. I would say that they should raise the price and get them. They would go along for six months or a year and come back again and, Why don't you increase the scrap business? and they would say we can't get cuttings enough. It went along I know for four or five years and finally I told them to put the price up until they did get them, and if they couldn't get it by putting it up once to keep on until they did get them.
>
> Q. Do you know how high the price went under those instructions?
>
> A. Twenty-two cents per pound, and we commenced to get more than we wanted and we reduced the price, because in all these

(a) Record, Vol. IV, p. 80.

things, supply and demand have got to regulate the price. What the price will go to I can't tell nor anybody else. If we get too many we will reduce our price and if we get too few we will put it up.

Q. Was this advance in the price of cuttings done with a view of forcing Friedlander to sell his business or otherwise put the scrap manufacturers out of business?

A. No, because I think really it benefited everybody in the scrap business to have a proper supply of the raw material so they will know what they are doing.

Q. What is the condition of the scrap business, what was it then and what is it now so far as being definitely fixed as other branches of the tobacco business are?

A. Well it isn't fixed yet, because I haven't found out what the proper price will be on scrap, and the size of the package to go ahead and use up this by product. It is impossible for me to tell and I don't know whether anybody else can; I haven't made up my mind" (a).

Besides these statements by practical tobacco men and more readily understood by those with no technical acquaintance with the business, is the direct and simple testimony of independent scrap manufacturers that they were not injured. This same Walter J. Friedlander in his testimony as to the injury done his business by a fierce labor boycott, incidentally brought this out:

"Q. And in that way (by the Labor Union boycott directed by business competitors) your business was injured?

A. Very much so.

Q. And more than it has ever been by any competition in size of packages or price of cuttings?

A. Well, during the days of competition our business always grew. Since the boycott it has fallen off 75 per cent. (b).

Q. What was your most profitable year, Mr. Friedlander?

(a) Record, Vol. IV, pp. 400, 401.

(b) Record, Vol. IV, p. 86.

A. 1904. Did you say year or years?
Q. Years?
A. The best were 1904 and '06.
Q. Was your business profitable during the whole of 1906? (The year of 1906 was the year of the so-called scrap war.)
A. Yes, sir.
Q. How much did you make out of your business during the 10 months of 1906 before you sold?
A. It was $62,300" (a).

Another important piece of testimony bearing upon this alleged attempt to crush competing scrap manufacturers is that of S. S. Bloch, a manufacturer of scrap tobacco, absolutely independent of The American Tobacco Company and in direct competition with it. He testifies that his scrap tobacco brings the highest price of any scrap tobacco on the market, and that The American Tobacco Company and other manufacturers make packages of scrap of various sizes, selling at various prices (b). He testifies that The American Tobacco Company went into the scrap business in 1899, and that his business has grown both in volume and profit since that time, and that during the last three years, which include the so-called scrap war, his business has increased (c).

(4) Another alleged attempt to crush a competing tobacco manufacturer by selling goods at cost or less than cost, is testified to with some detail by Henry N. Stone, traveling salesman of R. P. Richardson, Jr., & Company, Incorporated, who was, at the time of the transaction, in the employ of The American Tobacco Company (d). He testifies that in 1903, in the State of Mississippi, he sold a cigar for the American Tobacco Company called "Lisco," together with Bull Durham tobacco,

(a) Record, Vol. IV, p. 79.
(b) Record, Vol. IV, p. 555.
(c) Record, Vol. IV, p. 551.
(d) Record, Vol. IV, p. 656.

at a very low price, and with each pound of Bull Durham tobacco gave free another pound. The inference is that this was intended to crush "Old North State" tobacco, a brand that sells in Mississippi and belongs to Mr. Stone's present employer, R. P. Richardson, Jr., & Company, Incorporated. Even he does not testify that such a course did any especial injury to Old North State tobacco, and when Percival S. Hill, Vice-President of The American Tobacco Company, was recalled to the stand he showed clearly the advantage of responsible business heads over traveling salesmen as intelligent witnesses:

> "Q. You have heard the testimony with reference to the so-called Lisco cigar deal in Mississippi, with Bull Durham tobacco; was that a trade plan of advertising to crush competition of Richardson, a competitor of the American Tobacco Co., or any other competitor of the American Tobacco Co., and if not, just tell what all the circumstances were?
>
> A. It has nothing at all to do with the tobacco business. The facts are that this Lisco was a new brand of cigars, and for the purpose of getting it quickly on the shelves of the retail dealers we proposed giving something free with the cigar, and a number of things were considered, and we decided inasmuch as Bull Durham represented a quick cash value to the retailer that we would give so much Bull Durham with each thousand of Lisco cigars.
> * * *
>
> Q. Was the expense involved in this Bull Durham gratis on Lisco cigars charged to the Lisco cigar or was the expense of the Lisco cigars charged to the Bull Durham brand?
>
> A. The expense connected with the giving away of this Bull Durham with Lisco cigars was charged to the Lisco cigars.
>
> Q. Is it your habit to charge the expense of the gratis against the brand which is supposed to be benefited by the gratis?
>
> A. Always. * * *
>
> Q. Is it and has it been customary with

the tobacco business ever since you have known of it with the American Tobacco Co. and other manufacturers of tobacco when they desire to introduce a new brand to hook it up with a strong brand in a given section?

A. It is quite frequently done that way; sometimes a strong brand is given with the new brand for the purpose of inducing the retailer to put it on the shelves; sometimes the new brand is given with the strong brand for nothing and used as a gratis on the old brand, which insured it going on the retail shelves.

Q. But still for the benefit of the new brand?

A. Yes" (a).

It is to be noted that this witness represents R. P. Richardson, Jr., & Company, a corporation, of which The American Tobacco Company holds a majority of its stock. Of all the individuals with whom The American Tobacco Company has been associated in the relation of common ownership of stock, these minority holders of the Richardson Company are the only ones with whom it appears to have had litigation. Before this suit was instituted, the minority holders of the stock of R. P. Richardson, Jr., & Company, Incorporated, had brought suit to set aside the contract under which The American Tobacco Company owns its stock; that company was, nevertheless, made a defendant in the present litigation, and, since the minority stockholders are in actual charge of its affairs, it was thus given an opportunity to exploit for the benefit of such minority holders, and the benefit of the Government, all the charges it desired to make against the American Tobacco Company. It was represented by counsel throughout, and it is perfectly evident and natural that its counsel and counsel for the Government acted in co-operation; indeed, it is expressed to be the desire of R. P. Richardson, Jr., & Company, Incorporated—actually the desire of its minority stock-

(a) Record, Vol. IV, pp. 671, 672, 673.

holders—that the Government should succeed. The Richardson Company filed an answer (a), which answer is not supported by a syllable of testimony. The active president of that company, who is the principal minority stockholder, knew all of the facts; he was, of course, a ready and willing witness for the Government. With all this readiness and all this willingness, and, indeed, all of this anxiety to contribute to the Government's case, the only contribution that the minority stockholders of the Richardson Company could make was the foregoing with respect to the "Lisco" cigars.

The foregoing has been stated here for two reasons: In the first place, to emphasize the inability of the Government to obtain, even from anxious witnesses, any but the most trivial testimony affecting the integrity of the methods of these defendants; and, in the second place, to let the Court know that while the answer of R. P. Richardson, Jr., & Company, Incorporated, appears in the Record, it is by no means proof, it is not sustained or attempted to be sustained by a particle of evidence, and it, itself, is not verified.

(5.) It is said that The American Tobacco Company by oppressive methods of competition coerced the Nashville Tobacco Works to sell to it its business. G. A. Puryear testified that he was one of the officers and managers of the Nashville Tobacco Works, a corporation which manufactured tobacco from 1892 in Nashville, Tennessee; that he participated with two other owners of the business in selling it to The American Tobacco Company in April, 1906; and that he had been, at least in part, induced to make the sale by the fact that his firm was losing business on its popular brand, "Old Statesman," to a similar brand called "Bull's Head," marketed in his section by The American Tobacco Company. He testified that he did not know at what price "Bull's Head" sold, but that "the way he got his informa-

(a) Record, Vol. I, p. 265 *et seq.*

tion" was some of the merchants he had talked to had figured it down to about sixteen cents a pound, which in his judgment was less than the tobacco could be made and sold for (a). There are some things about Mr. Puryear's testimony, though, that throw some doubts upon it. In the first place, he admits that he got his understanding from grocery salesmen (b), and that his information from grocery salesmen had involved certain details of trade schemes which he himself had figured out, and finally that it had been his observation that the plug business in his section was losing some anyway to the twist business, a branch of the business of which The American Tobacco Company had or controlled a very small portion (c). The testimony of John H. Moore, who was not actively engaged in the management of the Nashville Tobacco Works, but who was a part owner in it, casts further doubt on the accuracy of Mr. Puryear's judgment in that he plainly attributes the loss of business by Nashville Tobacco Works to bad management of the company itself to a greater extent and the growth of the twist business to a lesser extent (d). After this testimony, though, the defendant The American Tobacco Company called E. S. Edwards, who is its sales manager in charge of this very territory, and he throws further light upon the failure of the Nashville Tobacco Works to make money; he testifies to the formation, in 1903, of a tobacco concern in Nashville, Tenn., of which the nephew of Mr. Puryear was at the head, and that this concern got out a brand called "Country Lad," of the same general kind at least as Old Statesman, and claimed to be its exact duplicate, which claim was supposed to be confirmed by the well known fact that at the head of the business of this manufacturer was a former employee of the Nashville Tobacco Works and

(a) Record, Vol. IV, pp. 165, 166, 171.
(b) Record, Vol. IV, p. 176.
(c) Record, Vol. IV, p. 181.
(d) Record, Vol. IV, pp. 186, 187.

the nephew of the man who for years had been the manager of the Nashville Tobacco Works, the manufacturer of Old Statesman (a). Mr. Edwards gives, further, this direct and explicit testimony as to the marketing of Bull's Head tobacco made by The American Tobacco Company: It was not sold at a price of sixteen cents per pound, but after taking into account all of the trade discounts and rebates, it netted to the manufacturer 30.40 cents per pound, and at that very time "Country Lad," claimed to be the exact duplicate of "Old Statesman," was going to the trade at a price which, after deducting trade discounts, &c., netted the manufacturer exactly the same price—30.40 cents per pound; and Strater Brothers, an independent tobacco manufacturing concern with a factory at Louisville, was competing in the same market with a brand called "Hand Spike," identical in general nature at least to these other three brands, at a price that netted the manufacturer exactly the same price, to wit, 30.40 cents per pound (b). The value of such distinct testimony over the indefinite, hearsay, testimony of Mr. Puryear is self-evident, without the necessity of recurring to the possible unreliability of Mr. Puryear and his nephew. It would seem unjustifiable to charge The American Tobacco Company with having crushed "Old Statesman," when it was only one of three competitors, all selling their goods at the same price, and with the advantage to "Country Lad" of having the representation, at least, of being the exact duplicate of the "Old Statesman" brand.

In connection with this Nashville Tobacco Works, it is interesting to note, as throwing light on the conduct by defendants of secretly controlled companies, and the letters that passed between officers of defendants and managers of some of these secretly controlled companies, a subject to be here-

(a) Record, Vol. IV, p. 572.
(b) Record, Vol. IV, pp. 570–572.

after discussed, that an officer of The American Tobacco Company suggested to the manager of one of these secretly controlled companies, Nall & Williams Tobacco Company, getting out a brand to "go after" a brand of the Nashville Tobacco Works (a). The Government would have the inference drawn that the purpose of such direction was to coerce the Nashville Tobacco Works into selling out its business, and that it was quite impossible for an ordinary independent manufacturer to stand the cross fire of competition from The American Tobacco Company itself and the secret competition of companies controlled by it. The General Manager of the Nashville Tobacco Works, the supposed victim of this kind of competition, was on the stand (b), a willing, if not unscrupulous witness; he was attempting to give reasons for the decline of the prosperity of his business that would reflect upon The American Tobacco Company; these reasons, as have been shown, were not such as to stand close examination. *He did not mention a brand of tobacco, or any conduct of the Nall & Williams Tobacco Company or any other secretly controlled company*, although under the examination of counsel for the Government who was already aware of the letter of directions to Nall & Williams Tobacco Company, already referred to. The explanation of this is easy. Nall & Williams Tobacco Company did not get out any brand, or, if they did, it was a complete failure. Undoubtedly, The American Tobacco Company tried to get business in the territory in which the Nashville Tobacco Works sold its goods, and it naturally and sensibly tried to get business on the same types of tobacco that had their popularity there; they profited by the experience of other manufacturers just as other manufacturers, if wise, profited by the experience of The American Tobacco Company. This is competition, and the Government has sig-

(a) Record, Vol. II, p. 545.
(b) Record, Vol. IV, p. 165.

nally failed to show that on account of it the Nashville Tobacco Works, or any other manufacturer has been required to sell, or go out of business.

(6) There has been introduced into this record a copy of certain parts of a record of a suit brought in the Circuit Court of Davidson County at Nashville, Tennessee, entitled Standard Snuff Company against American Snuff Company (a). This record consists of an unverified declaration and what purports to be three depositions. There are statements made along with the copy of the declaration and three depositions that the case was removed to the United States Circuit Court because of diversity of citizenship, that the defendant interposed a demurrer which was overruled, and thereupon defendant entered a plea of not guilty, and that on July 16th, 1904, the suit was dismissed without prejudice. The introduction of this was objected to (b), and the court below never passed upon, nor was asked to pass upon, the objection. Undoubtedly the whole thing is incompetent and will not be considered by this court, as it was evidently not considered by the court below. The evident intent of the introduction of such incompetent testimony (whatever may be said of the propriety of such) is to induce a reading by the court of the unverified declaration filed by the Standard Snuff Company and so conclude that the American Snuff Company was guilty of oppressive competition directed against Standard Snuff Company; this is to be taken in connection with the fact, and it is a fact, that American Snuff Company acquired the property and business of Standard Snuff Company by a purchsse of all its stock, while the suit was still pending. There is not a line of competent testimony showing any oppressive methods used by the American Snuff Company against the Standard Snuff Company, and the only testimony on the sub-

(a) Record, Vol. V, p. 307.
(b) Record, Vol. IV, p. 195.

ject refutes any conclusion that American Snuff Company purchased the Standard Snuff Company on account of the pendency of, or any fear of such suit:

"Q. Did the pendency of that suit influence the American Snuff Co. in purchasing the stock of the Standard Snuff Co.?

"A. Not the least bit; had nothing whatever to do with it. We never felt that there was anything in the suit at all, until we heard that there was a former employee of ours that was going to make oath to certain things which probably might have made it difficult to disprove, at least we thought it might, because he stated that he would make oath to instructions having been given to him by one of our division managers, with reference to doing certain kinds of work, and we thought there might be some difficulty about refuting that; but when he was put on the stand, he failed to make oath to any of these statements that we had heard he was going to make oath to; in fact, his testimony, so I was informed, did not amount to anything at all, and that was the only thing we had ever heard in connection with the suit, because the matter of taking up goods was a matter that was started by the Standard Snuff Co; that is, taking our goods and putting theirs in their place.

"Q. You mean it was started in the snuff business by the Standard Snuff Co.? A. Yes.

"Q. This witness whose deposition you refer to was a man named Stratton, was it not? A. Yes.

"Q. His deposition was taken at Shreveport, La.?

"A. Yes.

"Q. You don't know whether that deposition was ever filed or not, do you?

"A. I don't know anything about it; I have heard that it was not.

"Q. But counsel for the American Snuff Co. was present, and has told you about the result of it? A. Yes.

"Q. What did induce you to purchase that stock, was it to get rid of the competition of the Standard Snuff Co.?

"A. No; we felt that they had a business there of pretty close to 500,000 lbs., and they had built their business up on somewhat different lines from us. We sold exclusively to the jobbers, where a very large percentage of their business was with retail dealers, and we knowing that there were a great many retail dealers who like to buy direct from the manufacturer—

"Q. I am asking you now about your purchase; not why you were running it as a separate company?

"A. It was these considerations that I am mentioning, that induced us to make the purchase—and knowing that we could not sell direct to the retail dealers because of the objections that would be raised by the jobbers to whom we sold exclusively, we felt that we could have this business conducted along the same lines that it was being conducted, and supply that retail trade direct, and make money out of the business.

"Q. That it would be, conducted in that way, a good investment? A. Yes.

"Q. Has it turned out to be, considered on its own bottom, a good investment?

"A. Yes. It has not been quite as good as we thought it would be, but it has paid a very nice interest on the investment, and has been altogether a satisfactory purchase (a)."

These are the only instances, or certainly substantially all, in which the Government, with all its facilities for examination, say that the defendants have attempted to crush competition by advancing the cost of raw material, reducing the price of the finished product or other such methods. It is beyond belief that the Government has found many such instances, and has produced these six only as samples. The inability to establish any of these instances by definite and satisfactory proof, and the triviality of some of them, indicate the absence of others. To think otherwise would involve an unmerited reflection on the power of discrimination of Counsel for the Government. The effort of the

(a) Record, Vol. IV, p. 482,

Government was not to produce samples of misconduct, but all misconduct. The small number of instances produced and the inability of such instances to stand critical examination, reflect credit on defendants, but such condition also bears out the testimony of Mr. Duke and Mr. Condon, heretofore referred to, and appearing elsewhere in their respective testimony, that the business of a brand of tobacco cannot be destroyed or even substantially diminished, by mere cheapness of a competing product.

It is unquestionably true, as shown by this whole record, that eternal vigilance is the price of a profitable tobacco business. If a manufacturer has a brand that seems really to have no competition in a given section—and even small manufacturers have scattered all over the country that sort of monopolies—and he is satisfied and does nothing in that particular section, he will wake up too late, to find his business there gone. In the first place, some active competitor may have taken it—not by selling a product cheaper, but by constant advertising, by giving away samples, by interesting retail dealers, inducing them to attempt to induce consumers to take it, and other such methods. Even if this result does not follow, and if competitors keep out of the field, his business will dry up unless he is actively using aggressive methods in pushing it.

As bearing upon the methods of competition pursued by the defendants, there should be discussed the maintenance by defendants of secrecy with respect to their relations with certain manufacturers in whose property they owned an interest. If it is lawful for an individual or a corporation to own stock in another corporation, it is lawful too for that relation to be kept secret, at least so far as any anti-trust law is concerned. If such methods are

to be condemned at all, they are to be condemned as constituting immoral or unfair competition.

The situation that confronted the American Tobacco Company in 1903 had certain aspects that are worthy of serious consideration. In the first place, there was the belief, shared in by all its officers, that lines of its business could be more effectively prosecuted if left in the hands of a separate organization. Indeed, before 1903 that idea had impressed the company and led to the organization of the R. J. Reynolds Tobacco Company, Luhrman & Wilbern Tobacco Company, The John Bollman Company and others.

Another thing that rightly or wrongly impressed some of the officers of The American Tobacco Company in 1903 was an assumed prejudice against The American Tobacco Company and any concern known to be affiliated with it. Consumers of tobacco, having only their tastes to gratify, making purchases of inconsiderable separate amounts, having no measure of intrinsic value, but only the duty of satisfying their tastes, might be prejudiced against a product which they knew came from the so-called "Tobacco Trust." Whether officers connected with The American Tobacco Company took it very seriously or not, competing manufacturers did consider this prejudice as a legitimate asset in their business, and a propaganda was constantly issued by them appealing wholly to the actual or assumed prejudices of consumers against products of the so-called "Trust" (a).

Still another condition that was used by its competitors to the prejudice of the American Tobacco Company arose out of its relations to the Tobacco Workers Branch of the Labor Union. Now, the American Tobacco Company is not antagonistic to labor unions. Its attitude with respect to organizations of labor is exactly its attitude to organizations of farmers, as expressed in a letter from the presi-

(a) Record, Vol. II, pp. 678, 679, 697, 698.

dent of The American Tobacco Company to the president of the Burley Tobacco Growers' Association at Lexington, Kentucky (a). It employs labor, intending always to pay adequate wages, and without requiring the laborers to belong to any labor union, but without forbidding their joining any they please, and without any desire to use on its own products the blue label that indicates that the goods bearing such label have been manufactured in a factory organized and operated upon Union lines. The attitude of The American Tobacco Company is well expressed by its president:

> " Q. Mr. Duke, do you know that these various concerns I have mentioned, or some of them, Wells-Whitehead Co., Pinkerton Tobacco Co., Bland Tobacco Co., Nall & Williams Co. were using the Union Label on their goods?
>
> A. I heard so.
>
> Q. Did you understand that it was an apprehension that they might lose the Union Label that induced the minority holders in these businesses to keep secret the connection of the American Tobacco Co. with them?
>
> A. I have heard it both ways. As far as I have been concerned, when they talked with me about that I said I would not use anybody's mark except my own on my goods.
>
> Q. Was your objection to the Union Label because of hostility to Labor Unions?
>
> A. Not at all.
>
> Q. Is the American Tobacco Co. hostile to Labor Unions?
>
> A. Not at all.
>
> Q. What is the basis of your objection to the use of the Union Label?
>
> A. Well, I think you put your goods in a class with everybody else when you put on a Union Label, and I think there is a great many manufacturers that manufacture tobacco and put the Union Label on it with the idea that will sell it without making the quality of it as it should be. They don't depend on the quality; they depend on the Union Label to sell it.

(a) Record, Vol. IV, p. 432.

Q. And you believe in depending on the individual quality and not put your goods in the class with other manufacturers' goods?

A. Yes. We spend millions of money to establish trade-marks. Why do we want to go and put our goods under the label of a fellow that trusts to sell them on sentiment? It is nonsense" (a).

With this basis of hostility on the part of Labor Unions, some independent manufacturers, competitors of The American Tobacco Company, were industrious and zealous in their appeals to public sentiment and prejudice. The Globe Tobacco Company, a manufacturor at Detroit, Michigan, caused to be issued a circular advertising most of its brands, beginning in display type: "To Organized Labor, Greeting. Beware of Trusts. Why patronize the Tobacco Trust? Eternal vigilance is the price of liberty" (b). The president of the Wetmore Tobacco Company of St. Louis, Missouri, made a speech which was afterwards published on a card, containing extravagant appeals against the "Trust," with such highflown sentiments as follows: "The people are not going to stand idly by and see their rights, privileges and livings swept away," and then the card had in bolder type: "Chew 'Wetmore's Best.' Union Made" (c).

Perhaps the most explicit testimony as to the efforts of manufacturers to use the Labor Union anti-trust sentiment against the product of The American Tobacco Company is found in the testimony of the Vice-President of the International Tobacco Workers' Union, introduced as a witness by the Government (d). Certain brands of tobacco were manufactured by concerns which had come to belong, in part at least, to The American Tobacco Company, and the City of Cincinnati was flooded

(a) Record, Vol. IV, pp. 399, 400.
(b) Record, Vol. II, p. 697.
(c) Record, Vol. II, p. 698.
(d) Record, Vol. IV, p. 128.

with circulars, printed in red, with skull and crossbones, prominently marked "Death to the Users," signed "Tobacco Workers' International Union," warning all union men and friends of organized labor to leave alone the brands manufactured by these concerns. This was not an act of The Tobacco Workers' Union, it was a method of competition, initiated, engineered and financed by independent tobacco manufacturers. The testimony is distinct in this respect, and would be more definite and detailed but for the attitude of the Government in protecting with its ægis this witness on cross-examination:

> "Q. Did you distribute them?
> "A. Not myself personally.
> "Q. Did you have any of them printed?
> "A. Yes.
> "Q. Did you furnish them to competing "scrap tobacco manufacturers in Cincinnati?
> "A. Yes, we gave them to their travelling "men.
> "Q. Didn't they pay for them?
> "A. Yes, in one instance I know of.
> "Q. Did not the Independent Tobacco "Company of Cincinnati (independent to-"bacco companies of Cincinnati) pay for the "printing of a great number of these hand "bills?
> "A. Yes, sir (a).
>
> * * * * *
>
> "Q. What was the expense involved to the "Labor Union in printing and distributing "these circulars?
> "Mr. McReynolds: Now, Mr. Witness, I will have to say to you that while the Government has no objection, so far as its bearing on the case is concerned, if you do not care to go into these things that are utterly irrelevant, you may decline to answer them. That is your own personal privilege and you can act upon it or not, just as you please (b)."

(a) Record, Vol. IV, p. 128.
(b) Record, Vol. IV, p. 130.

It was not suggested that these various brands of tobacco had become unhealthy or that the conditions under which they were manufactured had become unsanitary, or that the wages paid to the men that made them had been diminished, but the only excuse for the existence of this violent boycott, which carried with it a threat of personal violence to those that disregarded it, was that The American Tobacco Company was part owner in the manufacturing concern that made these brands.

The most impressive story of the effect of such boycott is in the testimony of Walter J. Friedlander, who was the president of one of the concerns whose goods were thus boycotted, and who testified as follows with respect to the circulation of these circulars and the general boycott of his business:

"Q. How general was the circulation of these circulars through Cincinnati?

A. General enough to create consternation; they were thrown out by the thousands.

Q. Were your competitors active in the distribution of these?

A. Very.

Q. You say an employee of one of your competitors was handing them out?

A. He gave me one.

Q. And was he handing them out on the street?

A. Very generally.

Q. Did your competitors have them in large numbers in their factories?

A. Yes, sir; had two great bundles of them in their office.

Q. Were the products of the Day & Night Tobacco Company boycotted?

A. Yes, sir.

Q. To what extent and in what way; what do you know about it?

A. In general by bills such as this and also cards were gotten out tacked up in bridges and saloons, wherever they could get them. Then these various new tobacco companies, and some Union officers, although there were not as many Union officers as salesmen of the tobacco companies, started in with the saloons

of Cincinnati, which are the largest handlers of scrap tobacco there, and told them if they handled any of the Day & Night Company's goods they would have their places boycotted, and many of them came to me and said that while they had calls for the tobacco and would like it, but if we do these men won't come to our place. They also went to women who had candy stores and notion stores who also sell large amounts of tobacco, and told them the same thing, to put up these circulars there, and ignorant women would see this thing and would be afraid to handle our goods. We would go and speak to these people and tell them this is an American country and these things were unfair, and they would say it is unfair, but I have only got $40 in the world and that is all invested here and I can't take a chance. We can't get our tobacco back in a great many stores in Cincinnati to this day?

Q. And in that way the business was injured?

A. Very much so.

Q. And more than it has ever been by any competition in size of packages or price of cuttings?

A. Well, during the days of competition our business always grew. Since the boycott it has fallen off 75 per cent." (a).

Such conditions as these, constantly recurring in a more or less virulent way, were evident to tobacco manufacturers in and out of the organization of The American Tobacco Company. They had not affected the president of The American Tobacco Company. He testifies:

"Q. Was it your desire that the relations of the American Tobacco Co. to these various concerns should be kept secret?

A. No, sir; I was always opposed to it from my standpoint, because I thought it was foolishness, but to the man that is going to run the business I say here go ahead and run it any way you like so you make profits; that is all I care.

(a) Record, Vol. IV, pp. 85, 86.

Q. So far as you know it was the case in each of these instances where the relation of the American Tobacco Co. to the other company was kept secret, that it was done at the instance of the other party to the transaction?

A. Yes; I didn't agree with it at all, I thought they were making a mistake, but they thought different.

Q. Did you disagree with it on moral grounds?

A. No; I thought it was foolishness to try to run a business secretly. I would rather not do business than to have to do it in that way" (a).

Under this provocation, though, and because of the feeling of manufacturers in whose business The American Tobacco Company was about to acquire an interest, as well as the feeling of some of its own officers and sales managers, there were attempts made by these men, and co-operated in by officers of The American Tobacco Company, to keep secret from the general public the fact of the interest of The American Tobacco Company. This course was pursued at one time or another between 1903 and 1906 (with some companies only a very little while) with the following concerns, to wit: Nall & Williams Tobacco Company, R. A. Patterson Tobacco Company, Pinkerton Tobacco Company, Craft Tobacco Company, F. R. Penn Tobacco Company, R. P. Richardson, Jr., & Company, Inc., Wells Whitehead Tobacco Company, B. Leidersdorf Company, Bland Tobacco Company, Michigan Tobacco Works, H. N. Martin & Company, Nashville Tobacco Works, Queen City Tobacco Company and Day and Night Tobacco Company. All of these concerns had a minority interest, except Queen City Tobacco Company and Day and Night Tobacco Company, in which those in charge of the concern had an option to acquire a minority interest (b). It is testified, and in no way

(a) Record, Vol. IV, p. 395.
(b) Record, Vol. II, p. 677.

contradicted, that the maintenance of secrecy of the relations of The American Tobacco Company was at the request of this actual or prospective minority interest, which had charge of the management of the respective concerns (a). It is true, however, that the officers and employees of The American Tobacco Company co-operated in keeping this relationship secret and they do not shirk the reponsibility. They believed that in law and morals the maintenance of such secrecy was justified, especially when considered in connection with the methods of competition it was intended to combat—in order to avoid an unreasonable prejudice any man or corporation is justified in concealing his ownership of a particular business enterprise—in order to escape an assassin any man is justified in travelling *incognito.*

One or two of these cases of secretly controlled companies particularly illustrate the justification for their organization and secret operation: In New Orleans there is a strong labor union sentiment; The American Tobacco Company through its New Orleans plant had a large part of the cigarette business of and immediately adjacent to New Orleans. Some years ago People's Tobacco Company was organized. It became a union labor factory; its owner and managers became conspicuous in union labor meetings and promoted denunciations of trusts and combines to the end that their own brands of cigarettes, bearing the union label, might thrive among members of labor unions. And so its business did thrive, not upon the peculiar merits of the goods, or by the slow processes by which a brand usually becomes a large seller, but by leaps and bounds, and because of the union labor sentiment, and the prejudice created against the goods of The American Tobacco Company by the denunciation indulged in and propagated by the owners of the People's Tobacco Company (b). An opportunity came to The American Tobacco Company to invest

(a) Record, Vol. II, p. 677; Vol. IV, pp. 6, 395.

(b) Record, Vol. II, pp. 683, 644–647.

in a business to be organized and conducted by one Augustus Craft. Unquestionably the purpose of The American Tobacco Company in making this investment was to get for a company in which it was interested part of the profits of the business that had been taken from it by denunciation and prejudice (a).

Another illustration of these secretly conducted companies—and this illustrates all the cases except those falling under the foregoing illustration where secrecy has been maintained or sought as to ownership of an interest in a manufacturing concern—is had in the cases of the R. A. Patterson Tobacco Company and the Standard Snuff Company, both of which had well established businesses with their own avenues for distribution well fixed, their own salesmen working with zeal and an *esprit du corps* under their own managers. As well expressed in a letter of Mr. M. C. Patterson, the head of the Patterson business (b) and in the testimony of Mr. Condon, President of American Snuff Company (c), it was desirable, in order to maintain these fixed channels and the *esprit de corps* of the employees that the ownership by the larger company should not be publicly known or discussed.

After all is said, though, this maintenance of secrecy was negative rather than affirmative. It involved carefully planned methods of preventing the relationships becoming known, such as having mail directed to some address other than the well known address of The American Tobacco Company, and in names other than the well known names of the vice-presidents of the company; it involved the use of paper and envelopes that had no printed heading, and sometimes of letters upon which did not appear the name of either the person addressed or the person writing the letter. If it be once conceded that the maintenance of

(a) Record, Vol. II, pp. 683, 647.
(b) Record, Vol. II, pp. 585–586.
(c) Record, Vol. IV, p. 505.

secrecy—the failure to publicly announce an acquired ownership—is not to be condemned, it is hard to see the ground for condemning these methods of maintaining the secrecy. But one looks in vain through all the mass of testimony turned over to counsel for the Government by defendants for a suggestion that falsification should be indulged in. Mr. Duke testifies that he never thought of telling a falsehood about any of it to anybody (a), and on a visit of the President of the Tobacco Workers' Union, long before the institution of this suit, he told him frankly the companies in which The American Tobacco Company held stock, and the union label was not taken from them (b). Mr. Moore, one of the parties that sold the Nashville Tobacco Works to The American Tobacco Company, testifies that Mr. Dula told him that he was not asked to tell any untruth (c). Mr. Hill writes to the manager of the Wells-Whitehead Tobacco Co. to make no statement that is untrue (d). Mr. Hill writes to Mr. Pinkerton, manager of the Pinkerton Tobacco Company, to make no untruthful statement to the officers of the Tobacco Workers' Union who are to confer with him (e). Mr. Carter, of the Wells-Whitehead Tobacco Company, makes a truthful statement to the president of the International Tobacco Workers' Union, and is told by him that the ownership of stock by The American Tobacco Company in his concern does not effect his right to use the union label (f).

These secretly owned corporations were an experiment on the part of The American Tobacco Company and their effect and operations were properly closely watched by its officers. Vice-President Hill had particular charge of the selling of smoking

(a) Record, Vol. IV, p. 400.
(b) Record, Vol. IV, p. 138.
(c) Record, Vol. IV, p. 183.
(d) Record, Vol. II, pp. 290, 296.
(e) Record, Vol. IV, pp. 48, 680.
(f) Record, Vol. II, p. 382; Vol. IV, pp. 593-594.

products and Vice-President Dula had particular charge of the selling of plug products. They had voluminous correspondence with the managers of these corporations. The Government in the preparation and presentation of its case has had access to the whole volume of this correspondence—all letters received by these gentlemen and letter books containing copies of letters written by them. No suggestion is made that there has been destroyed or lost a single letter, even those that never entered the company's files but were kept among the private correspondence of these gentlemen respectively (a). Out of several thousand of these personal and intimate letters between men engaged in marketing tobacco, the Government has introduced as many letters as it saw fit, that, under the most unfavorable circumstances, could in its judgment contribute to the Government's contention that there has been an effort through these secretly owned companies to harass or impede the progress of competing tobacco manufacturers or take from them a part of their business. It would be denying human nature to pretend that the Vice-Presidents of the American Tobacco Company would not prefer that the growth of one of the brands manufactured by one of these subordinate companies should operate to diminish the business of some competitor rather than that it should operate to diminish the business of one of The American Tobacco Company's own brands, and these letters furnish abundant evidence that they from time to time had attempted to urge the competitive and agressive measures of these companies into sections where competitors of The American Tobacco Company had the bulk of the business or an evidently growing business. Besides this though, sections in which the public has shown a fondness for goods bearing the union label constituted evidently better places for those companies which used a union label to go than places where no such fondness had been

(a) Record, Vol. II, pp. 360-2, 684-5.

shown, and so advice to these secretly owned companies to go into such fields was actuated by a desire to benefit these companies, and only incidentally if at all injure competitors (a). All of these letters are to be read in the light of a fair knowledge of human nature and with the realization that the men who wrote them were, whatever their official position, tobacco salesmen, intimate with the methods of selling tobacco, speaking the language of that business, and knowing personally and intimately the persons to whom they were written. Light is thrown on these letters and the spirit in which they were written and the meaning which is to be given them by consideration of the fact, and it is a fact, that more than half of the suggestions made by officers of The American Tobacco Company to their managers were not adopted (b). Rightly read there is no letter that contradicts the allegation of the Answer that with respect to all these companies, The American Tobacco Company, "while always "willing to give such organization the benefit of its "knowledge of the trade, has left such organization "to work out its own salvation aided by informa-"tion and advice from The American Tobacco "Company's organization, but never controlled or "compelled by such organization" (c).

A case of the maintenance of the secrecy of relations which perhaps does not have its logical place here, ought, nevertheless, somewhere to be mentioned: The American Tobacco Company became interested, by the indirect ownership of a part of their stock, in the United Cigar Stores Company, a concern selling tobacco and cigars at retail, and in M. Blaskower & Company of San Francisco, a small concern selling tobacco and cigars at retail. Some of the officers of The American Tobacco Company were

(a) Record, Vol. II, pp. 388–389, 691.

(b) Record, Vol. II, pp. 686–689.

(c) Record, Vol. II, p. 690; Answer, The American Tobacco Co., Record, Vol. I, p. 260.

desirous of keeping secret such interests because of the easily understood apprehension that the knowledge by other dealers that it, a manufacturer, was interested in the business, certain dealers would arouse hostility on the part of such other dealers. It appears that The American Tobacco Company, in order to enable the fact of such interest to be denied with technical correctness, had the stock of these companies put into the ownership of some subordinate company. No attempt is here made to conceal or mollify the fact that in a letter that Vice-President Hill wrote to Mr. Estabrook, a tobacco dealer in Boston, it was intended by him to deceive Mr. Estabrook as to the actual conditions (a). There was no technical falsehood because the legal ownership of an interest in the United Cigar Stores Company was not in The American Tobacco Company. Any attempt to evade or refuse to answer Mr. Estabrook's question would have been a virtual statement that The American Tobacco Company did have such ownership. Without intending to set a low standard of business morality, it is intended to say that when applied to lawyers who have confidential business for clients, brokers who have confidential accounts for their customers, manufacturing concerns who have relations with dealers, which relations, if they were disclosed, would operate to the injury of such dealers or to the injury of the manufacturers themselves, the rule that morality requires them to answer impertinent questions by the actual or virtual disregard of these duties and interests, is ridiculous and does not obtain.

Another of the allegations of the petition affecting methods of competition is that the defendants have closed the avenues of distribution. Evidence was taken by the Government as to the ownership by certain of the defendants of certain other of the defendants engaged in merchandising tobacco; of certain action taken by The American Tobacco Com-

(a) Record, Vol. II, p. 232.

pany in New England and in Philadelphia which operated to induce some jobbers to decline to handle the goods of competing concerns; that the American Tobacco Company has given special commissions to certain merchants that bought from it. The theory this kind of testimony must have been intended to sustain is that the dominance of the defendants in the general tobacco business, united as these defendants are by interownership of stock, prevents the manufacturer of tobacco, or of the products of tobacco, not in some way connected with the defendants, from securing a distribution of his goods.

Let us first consider the so-called New England and Philadelphia deal. It was an offer by The American Tobacco Company made to the jobbers of New England and Philadelphia that if they would confine their sales to the products of The American Tobacco Company (it had no application to cigars or snuff, and it did have application against companies such as R. A. Patterson Tobacco Company and others owned by The American Tobacco Company, but conducted by separate management) they would receive a special commission of six per cent. on their sales. This proposition was only a part of a general proposition made to these jobbers, the whole being that they should buy the goods at a list price with a two per cent. commission if they maintained such list price, and this six per cent. additional for such exclusive handling, giving to those who accepted the whole proposition an eight per cent. profit (a). The jobber who did not desire to accept the proposition so far as it referred to exclusive handling could still buy the goods and make a two per cent. profit, because his more favored competitor who received a six per cent. profit was prevented from cutting the price. In the first place this method was definitely and permanently abandoned in November, 1904 (b), nearly three years before the in-

(a) Record, Vol. II, p. 716.

(b) Record, Vol. II, p. 716; Vol. IV, pp. 327, 425-427.

stitution of this litigation, and it is hard to see how it can be made the basis of any injunction, even if it were deemed illegal. In the second place, it is abundantly proven by officers of The American Tobacco Company and jobbers, that this plan was not originated by The American Tobacco Company at all, but was sought by certain of the jobbers in order to enable them to make a profit upon the products of The American Tobacco Company that that they sold (a). These jobbers had large businesses on brands of tobacco manufactured by The American Tobacco Company, which were popular with their customers, and, in efforts to get business, prices on these popular brands were reduced first by one and then by the other until they were generally sold at practically cost. The American Tobacco Company was unwilling to put on a plan that would prevent the "cutting of prices" on its brands and leave jobbers free to "cut prices" on like brands of its competitors, because such plan might make the goods of competitors too popular with retailers, who would thus get them cheaper. In this condition certain jobbers asked that a fixed selling price be established by The American Tobacco Company, and stated that they would refrain from selling its competitor's goods. Upon these requests The American Tobacco Company tried the plan, not expecting to monopolize the trade, but expecting that a proportion of the jobbers would accept their proposition and make a profit on their goods and refrain from selling the goods of their competitors, whereas another proportion of the jobbers would not accept the proposition, but would devote their energies to selling the goods of its competitors (b). They knew that without respect to the effect of this proposition on existing jobbers, such plan would not give monopoly because tobacco jobbers are not a privileged

(a) Record, Vol, IV, pp. 425, 597, 705.
(b) Record, Vol. IV, pp. 598, 706.

class, created by patent—the jobber handling tobacco to-day may refrain from handling it to-morrow, and the jobber not handling it to-day may begin handling it to-morrow; the retailer of tobacco to-day is the jobber and retailer of to-morrow; the only thing necessary to constitute one a tobacco jobber is a desire to enter into the business and a small capital, or some means of inducing manufacturers to give him a reasonable credit. It was simply a plan of distributing goods, asked for by certain jobbers, and therefore adopted by The American Tobacco Company, tried for a few months and in November, 1904, definitely and permanently abandoned as not being to the interest of The American Tobacco Company in securing a distribution of its goods.

Further, it is said that the avenues of distribution are closed because jobbers receive special commissions from some of the defendants, and therefore are unwilling to handle competing goods. It appears that the smoking tobacco department of The American Tobacco Company sells to about five thousand jobbers, and of these five thousand jobbers it pays a special commission to two hundred and fifty-three (a); that the purpose of this payment is to stimulate the efforts of these jobbers in the distribution of these products of The American Tobacco Company; that the jobber can be of aid to a manufacturer, especially in giving a quick distribution to new brands put out by such manufacturer; that the jobber cannot really retard the business of a brand which the manufacturer adopts proper means to popularize, because if the consumer calls for a given brand of tobacco from the retailer the retailer will desire to put it in stock, and if he desires to put it in stock, the jobber with whom he usually deals must fill his orders or some other jobber will; that there exists no reason why competing manufacturers should not pay the same kind of special commission to such jobbers as they

(a) Record, Vol. II, p. 364.

see fit, even those to whom The American Tobacco Company pays a special commission, because these jobbers owe no duty to The American Tobacco Company not to receive the same sort of special commissions for the same sort of service from independent competing manufacturers; and it abundantly appears that they do so pay these commissions to some of these identical jobbers (a).

Besides the testimony of officers of The American Tobacco Company themselves there is a striking array of testimony that the avenues of distribution for tobacco and its products are not closed. Adolph D. Bendheim, president of the Metropolitan Tobacco Company of New York City, introduced by the Government, says: That his company is the sole customer of The American Tobacco Company in New York City, and receives a five per cent. special commission from the American Tobacco Company; that it handles the tobacco and cigarettes of a large number of independent concerns and makes no reports to The American Tobacco Company as to such sale by his company of the goods of independent manufacturers, and does not ask The American Tobacco Company when or whether he shall begin the sale of a given independent brand; that it receives special commissions from independent manufacturers (b). Henry N. Stone, a witness for the Government, salesman for R. P. Richardson, Jr., & Co,, Inc., says that in the southwest where the tobacco of his present employer sells he has no difficulty in getting it handled by all the jobbers that he desires (c). Addison Fowler, a witness for the Government and salesman for the United States Tobacco Company, says that since the fall of 1904, when the New England and Philadelphia deal heretofore mentioned was discontinued, there has been no difficulty in securing the distribution of the products of his company through all the jobbers

(a) Record, Vol. II, p, 365.
(b) Record, Vol. III, p. 269 *et seq.*
(c) Record, Vol. III, p. 676.

through whom they desire to distribute such products from the Atlantic to the Pacific Coast (a). Frank C. Letts, a witness for the defendants, at the head of a chain of wholesale grocery stores in the north and middle west, with an aggregate annual business of sixteen million dollars, says he has gotten a commission of three per cent. from the smoking department of The American Tobacco Company, but that it was not on condition that he should not handle competing tobaccos, that all of his stores, in fact, handle competing tobaccos in substantial quantities and that never, directly or indirectly, has he been asked or requested by any officer or employee of The American Tobacco Company to refrain from handling such competing brands, or to retard the distribution of competing brands, or to report on the brands so distributed either as to name or amounts. He makes a significant statement that has a bearing upon the assumed fear of The American Tobacco Company under which jobbers who receive its special commission are alleged to operate—he knows that The American Tobacco Company is largely interested in American Cigar Company, and yet he handles a small number of the cigars of American Cigar Company compared with the cigars he handles of independent manufacturers (b). W. H. McCord is at the head of a chain of wholesale grocery stores operating through the middle and southwest, which have an annual business of some $12,000,000, and he, too, receives a special commission from the smoking department of The American Tobacco Company, but not upon condition that he shall not handle competing goods, and he does, in fact, handle them, and makes no report to The American Tobacco Company with respect to them—his concern buys no cigars at all from American Cigar Company, but devotes its entire energy in the cigar line to the goods manufactured by the independent concerns (c). Nathan Eckstein, at the head of the

(a) Record, Vol. IV, p. 327.
(b) Record, Vol. IV, p. 461.
(c) Record, Vol. IV, p. 470 *et seq.*

largest house on the Pacific Coast, testifies to substantially the same state of facts (a); as do also Harold P. Brewster, the owner of a large tobacco and cigar house in Rochester, New York (b); A. M. Wilson, one of the large New England jobbers at Hartford, Conn. (c); T. R. Savage, Bangor, Maine (d), both of which two last mentioned jobbers testify in detail, and in complete corroboration of officers of The American Tobacco Company, that the New England and Philadelphia deal was put on at the instance of jobbers, and that it was never thought it would have, and never had, the effect of giving to The American Tobacco Company any monopoly of the local business. Joseph Furst, one of the leading jobbers of Charleston, S. C. (e); T. C. Jenkins, one of the leading jobbers of Pittsburg, Pa. (f); Herbert Deiches, a leading tobacco and cigar jobber of Baltimore, Md. (g); H. I. Johnson, of Johnson & Murray, a leading jobber of Utica, New York (h); Marshall Sheppey, head of the leading house of Berdan & Company, of Toledo, Ohio (i); Gilbert W. Lee, of the leading house of Lee, Cady & Smart, of Detroit, Michigan (j) all testified, and their testimony is to the same general effect—that the jobber can be of aid to the manufacturer in furthering the distribution of his goods. that that aid consists of having the drummers call specially to the attention of the retail trade which he visits particular brands of goods—particularly new and unknown brands—and to attempt to induce such retail trade to put them in; that after all, though, the success of particular brands of tobacco

(a) Record, Vol. IV, p. 526 *et seq.*
(b) Record, Vol. IV, p. 542 *et seq.*
(c) Record, Vol. IV, p. 595 *et seq.*
(d) Record, Vol. IV, p. 705 *et seq.*
(e) Record, Vol. IV, p. 634 *et seq.*
(f) Record, Vol. IV, p. 605 *et seq.*
(g) Record, Vol. IV, p. 559 *et seq.*
(h) Record, Vol. IV, p. 699*et seq.*
(i) Record, Vol. IV, p. 626 *et seq.*
(j) Record, Vol. IV, p. 614 *et seq.*

must be achieved by the manufacturer by the creation of a consumers' demand; that when this consumers' demand is created the retailer is certain to want the goods, and if the retailer wants the goods he can certainly obtain them; that the giving of special commissions by manufacturers to distributors to stimulate their efforts is usual, both by tobacco manufacturers other than The American Tobacco Company, and manufacturers of articles other than tobacco, or its products, and has always been; that none of the defendants have directly or indirectly required, or asked them not to handle competing goods or sought to regulate them in their handling of such goods; that they each and all do handle competing goods to the extent that their customers desire. The testimony of these jobbers is not very long, but it is vastly important, showing as it does the method of distributing tobacco and the fact that the avenues for the distribution have not been closed and cannot be closed.

Finally, S. S. Bloch (a), the leading independent scrap manufacturer of the United States, and Fred C. Peper, the leading independent plug manufacturer of the United States (b), and both members of the firm of Schinasi Brothers, the leading independent Turkish cigarette manufacturers in the United States (c), none of whose plants any of these defendants has ever attempted to buy (d), testify that in the marketing of their products they have found no channels of trade closed; that they have no difficulty in securing jobbers or retailers to handle their goods; that their business has grown and prospered; and that they have been built up, first, by their own efforts as manufacturers to make popular their brands with consumers, after which they had found the avenues to the con-

(a) Record, Vol. IV, p. 550 *et seq.*
(b) Record, Vol. IV, p. 644 *et seq.*
(c) Record, Vol. IV, pp. 659, 664 *et seq.*
(d) Record, Vol. IV, pp. 555, 645, 660.

sumer through the jobber and retail merchant open and unobstructed. This presents a remarkable aspect of this litigation with reference to the charge that the avenues of distribution have been closed, and that the conduct of the defendants, otherwise, has prevented or embarrassed the business of competitors. The charge of the petition is that the defendants have driven out opponents, deterred others from entering, and now unreasonably hinder, restrain and monopolize interstate and foreign trade and commerce in leaf tobacco and articles fabricated therefrom or necessary therein; that they have already driven out most opponents and have obtained such power in combination that the few established competitors must conduct their business in the well-grounded fear of swift destruction whenever defendants may decide to eliminate them; and that the mere withholding or withdrawal of their numerous brands from any tobacco dealer, jobber or retailer would probably render his success impossible. In proof of all of this the Government introduces not a single independent tobacco manufacturer, but only four traveling salesmen, each of whom, as has been already noted, testifies that the business of his employer is growing, that the avenues of trade are not closed, and that no difficulty is had in the distribution of his goods. The only independent manufacturers, responsible owners of factories, are introduced by defendants, and they testify to a growing and not a declining business, to an absolutely open condition and not closed avenues of trade, and to methods of competition only such as are as old as the tobacco business itself.

This is in addition to the testimony of officers of The American Tobacco Company culminating in the impressive testimony of Mr. Duke, the president of the American Tobacco Company, that there exists no condition to-day that makes the entry into, and success in, the tobacco business more difficult than when he entered into it and started his successful career; that in opposi-

tion to The American Tobacco Company he could succeed to-day as well as ever (a).

Not only have the established tobacco manufacturers that have been well conducted been successful, but new tobacco manufacturers, like Scotten-Dillon Tobacco Company (b) and United States Tobacco Company (c), in plug and smoking tobacco; Ware-Kramer Co. (d), in domestic cigarettes; Butler-Butler, Inc. (e) and hosts of others in Turkish cigarettes (f), have started in the very height of the success of The American Tobacco Company, and have established businesses of large, and sometimes immense, volume and profit (g). It is a fact, too, as shown by the reports of the Commissioner of Internal Revenue, which under the stipulation may be considered by the Court just as if introduced into evidence (h), that there were in 1890, the year of the formation of The American Tobacco Company, 1,021 tobacco factories in the United States, and in the year 1906, 3,065 tobacco factories in the United States, and that the cigar and cigarette factories have increased in the same period from 23,119 in 1890 to 26,348 in 1906.

Not only are competing tobacco, cigar, cigarette and snuff manufacturers in no danger of being crushed by the success of the defendants, but the public, consumers of these articles, are in no danger of not securing goods of other manufacturers, if they desire such goods, or of having their prices for tobacco made unreasonable or burdensome. In practically every one of the six hundred thousand retail stores in which tobacco and its products are

(a) Record, Vol. IV, p. 445.
(b) Record, Vol. II, p. 366; Vol. IV, pp. 448, 449, 616–
(c) Record, Vol. IV, p. 327; Vol. II, pp. 370, 371–
(d) Record, Vol. III, pp. 456, 457.
(e) Record, Vol. III, pp. 409, 575.
(f) Record, Vol. III, pp. 578–580; Vol. IV, pp. 669, 670–
(g) Record, Vol. II, pp. 366, 719; Vol. IV, p. 449.
(h) Record, Vol. II, p. 5.

dealt in, there are competing brands of all brands made by any of the defendants (a). The Government put on the stand a prominent New York jobber who does not handle the goods of defendants, one Hillman (the only jobber except the President of Metropolitan Tobacco Company whom the Government introduced), he testifies that he is a large jobber, that he has facilities for reaching the retailers and does reach them, and that he can get from manufacturers having no connection with the defendants goods of a similar kind and quality to each class of goods manufactured by defendants and at a price not exorbitant (b). So far as price of tobacco and its products is concerned, the ability of the public to take care of itself is equally assured. Many extracts from the testimony might be made to show this:

> "Lorillard, one time away back fifteen or twenty years ago, had a piece of tobacco that he called Five Cent Ante; it had an immense sale and was growing right along. The price of leaf tobacco got up and they couldn't make any money on it, and they changed it to Six Cent Ante, and the trade dropped right down on them.
>
> Q. That is because there was no six-cent coin?
>
> A. No; and the people feel they are being imposed on. You have got to satisfy the public. We don't want anybody to regulate us except the public; they are doing it all the time" (c).
>
> "Q. Can the consumer get, manufactured by the American Tobacco Company and manufactured by its competitors as well, different amounts of tobacco cigarettes for the same price? If so, just illustrate how it is.
>
> "A. Well, they can buy a one-ounce package of tobacco for five cents; they can buy a one and two-thirds ounce package for five cents, and two ounces for five cents, and a two and a half ounce package of tobacco for

(a) Record, Vol. IV, p. 438; Vol. II, p. 718.

(b) Record, Vol. III, p. 497.

(c) Record, Vol. IV, pp. 440-441.

five cents. And an eight-ounce package of tobacco for 10 cents and a pound package of tobacco for twenty cents.

"Q. How about cigarettes?

"A. Cigarettes, they go by 20 for five cents, ten for five cents, ten for ten cents, ten for fifteen cents, 10 for 25 cents, and some prices are a little higher.

"Q. And these different brands are all tobacco and usable?

"A. Yes, sir.

"Q. And kept in the same store?

"A. Yes, sir" (a).

Reference will be made here very briefly to the connection between The American Tobacco Company and the United Cigar Stores Company. The United Cigar Stores Company is a defendant herein and has its own counsel and will file its own brief and argument. It may be said, however, upon the testimony of officers of the American Tobacco Company and United Cigar Stores Company, and uncontradicted, that the formation of United Cigar Stores Company was not a plan or scheme of The American Tobacco Company, and that, so far from aiding therein, it, so far as it properly could, discouraged such organization (b); that the United Cigar Stores Company operates and was formed to operate retail stores, and if it engages in interstate commerce at all, such interstate commerce is the most insignificant part of its business—every sale conducted by it is over one of its own counters and is an intra-state sale; that it handles the goods that are called for by its trade, whether they be the goods manufactured by The American Tobacco Company or some one or other of the defendants or one of their competitors; that it is run in the interest of the stockholders of United Cigar Stores Company, and its policy is not controlled by the American Tobacco Company or any other of the defendants (c).

(a) Record, Vol. II, p. 413.

(b) Record, Vol. IV, pp. 414, 415.

(c) Record, Vol. III, p. 116 *et seq.*

These defendants contend that the business of manufacturing and selling tobacco and its products is not a business to be considered under the ordinary rules of monopolization or restraint of trade, because it is a business of brand against brand, and that the public is not affected and there will be no lessening of competition nor restraint of trade, however so many of these particular brands fall into the hands of a common owner. The Government seems to take the opposite position, for a part of the charge it makes is the ownership of The American Tobacco Company for instance of stock in companies manufacturing and selling snuff and cigars; this charge is conceivable as a charge only on the assumption that the business of manufacturing and selling snuff and cigars is a part of the same business as manufacturing and selling tobacco and cigarettes, for surely there is no prohibition under the Sherman Law, or otherwise, of a common ownership or control of non competing businesses.

Take the position of the Government that the business of manufacturing and selling the products of tobacco is one business, and the defendants have not, in the aggregate, anything approaching a majority, much less a monopoly of it. Measured in the prices consumers pay for the articles, tobacco and snuff sold in this country is worth, on the average, not exceeding forty-five cents a pound (a), the average cost to the consumer of cigarettes and little cigars is six-tenths of a cent each (b); the average cost of cigars is five cents a piece (c). Applying these figures of value to the Government's exhibits showing the production in 1906 of all the products of tobacco manufactured in the United States, and showing separately all those manufactured by any and all of the defendants, or any individual or per-

(a) Record, Vol. II, p. 412; Vol. II, p. 726.
(b) Record, Vol. II, p. 413.
(c) Record, Vol. III, p. 685.

son directly or indirectly connected with any of the defendants, we have the following result (a):

1906.

Total Output in the United States.

Cigars	7,147,548,312	average	5c. apiece	$357,377,415
Cigarettes	4,511,997,137	"	60c. 100	27,071,982
Smoking	175,664,091	"	45c. lb	79,048,840
Plug and Twist	176,749,800	"	"	79,537,410
Little Cigars	989,751,253	"	60c. 100	5,938,507
Snuff	23,566,731	"	45c. lb	10,605,028
Fine Cut	12,742,345	"	"	5,734,055
Total				**$565,313,237**

Output of Defendants in the aggregate, etc.

Cigars	1,051,558,221	average	5c. apiece	$52,577,911
Cigarettes	3,354,797,800	"	60c. 100	20,128,786
Smoking	123,026,237	"	45c. lb	55,361,806
Plug and Twist	143,906,868	"	"	64,758,090
Little Cigars	804,425,670	"	60c. 100	4,826,553
Snuff	22,575,826	"	45c. lb	10,159,121
Fine Cut	10,321,285	"	"	4,644,578
Total				**$212,456,845**

On the above basis all the defendants in the aggregate have **37-3/5** per cent. of the total output.

Now, if mere bigness is to be condemned, as seems to be the theory of the Government, these defendants, even considered as operating under a single man or with a joint organization, are not to be condemned, for they have substantially less than fifty (50) per cent. of the business, whereas fifty (50) per cent., has been the line between the "good trusts" and the "bad trusts" suggested by even some extreme publicists.

(*d.*) *Covenants not to re-engage in business.*

When the American Tobacco Company was formed none of the five vendor corporations nor their owners entered into any covenants not to re-

(a) Record, Vol. V, Ex. Nos. 77-86.

engage in the business of manufacturing or dealing in tobacco (a). Thereafter The American Tobacco Company and the other defendants have usually, but not always, taken covenants from the respective vendors to them (whether partners in a partnership vendor, or principal stockholders in a corporation vendor) not thereafter for a specified number of years to engage in the business of manufacturing or dealing in tobacco in any form in any of the States or Territories of the United States (with the exception of one or two States or Territories). These covenants have run for various terms from one year to fifteen years (b).

The question involved with respect to these covenants is whether they were taken in good faith to protect the good-will bought, or whether they were intended as contracts in restraint of trade and to have the effect of securing to the vendee corporation a monopoly. The defendants would call attention to the following facts: *First:* Without citing particular pages, the Record is full of testimony that the good-will of a tobacco business is coextensive with the country—in every section every type of tobacco is sold to some extent. The American Tobacco Company and other manufacturers are constantly trying to push new types in new sections. Tobacco made in Virginia is popular even in New England; brands made in North Carolina are the largest sellers even on the Pacific Coast; brands made in St. Louis and Louisville have their popularity all over the country. So these covenants are reasonable and not unreasonable in their extent of territory. *Second,* in various lines of the tobacco business the name of the original maker becomes part of the trade-mark, and conspicuous on the labels and in the mind of the trade, and it would be evidently to the disadvantage and a depreciation of such brand and label, if a concern or its members that had sold

(a) Record, Vol. IV, p. 339.

(b) See admissions made by defendant, Record, Vol. V, p. 1 *et seq.*

their good-will were permitted to go immediately into business again; Spaulding & Merrick's tobacco, Blackwell's Durham tobacco, Duke's cigarettes (a), Garrett's snuff, Stewart Ralph's snuff (b) are only a few of the illustrations that appear in the Record of this fact. *Third:* The defendants, the vendee corporations, have taken covenants only from owners of the business and not from the people familiar with manufacturing the goods, their employees, nor even from its own employees, as it would have done if it had sought a monopoly of the tobacco business, by disabling every competent and experienced man from engaging in the business. The following from the testimony of James B. Duke, President of The American Tobacco Company, enforces this fact:

> "Q. Has it been the policy of The American Tobacco Co. to require from its superintendents or foremen covenants not to engage in business for competing manufacturers?
>
> A. No, sir.
>
> Q. Has the American Tobacco Co. or any other of these companies done that at all?
>
> A. I don't recall ever hearing of a case. We only require them when we buy a man's trade mark and his good-will and pay him for it. Any of them that we have bought that want to be released, if they will come and pay us back the part we have applied to the good-will part, we will release them and let them go ahead again.
>
> Q. When you have bought factories has it been the policy of the American Tobacco Co., or any of the companies in which it holds stock, to require covenants not to re-engage in business from the practical manufacturers, or from the man identified in the public mind with the business?
>
> A. Not unless they were stockholders.
>
> Q. Has it been the stockholders or owners of the business and those identified in the public mind with the business?

(a) Record, Vol. IV, p. 393.

(b) Record, Vol. II, p. 444.

A. Yes, sir.

Q. And to whom the purchase price was paid?

A. Yes.

Q. There are scattered all over the country, are there not, former employees of manufacturers that you have bought out; former employees of the American Tobacco Co. itself who are familiar with the methods of manufacturing tobacco?

A. Some of the former employees who were not bound up when we bought the concern out, knew more about manufacturing tobacco than the man that owned the business and sold it.

Q. And you knew that when you bought, didn't you?

A. Yes.

Q. And you did not require the covenant from the practical manufacturer but from the man who owned the business and was identified with it in the public mind?

A. Yes; he sold his good-will and we required him to sign a contract not to re-enter the business more as a matter of form than anything else.

Q. But there are also men scattered throughout the country, former employees of the American Tobacco Co. or former employees of manufacturers that you have bought out, who are thoroughly familiar with the methods of manufacturing tobacco, are they not?

A. Yes, sir; plenty of them.

Q. And in some cases you have found that the men from whom you did not take the covenants are quite as familiar with the marketing of the tobacco as the men from whom you did?

A. Yes; there are plenty of people in the United States that are familiar with the marketing of tobacco, in our employ and out of it, that anybody can get if they want them now.

Q. And so with the manufacturers?

A. Yes" (a).

Fourth: The American Tobacco Company and its predecessors have had frequent illustrations of the

(a) Record, Vol. IV, pp. 445, 446.

attempt by vendors to make capital out of the good-will theretofore conveyed, and so has been warned of the practical advantage of such covenants. One case was that of the United States Tobacco Company, a company organized by the same men who had formerly been with the J. Wright Company, which in 1899 sold its business to Continental Tobacco Company; these men within less than a year organized the United States Tobacco Company, and put out in the trade circulars announcing that its president was formerly with the J. Wright Company, and that its secretary was formerly with the J. Wright Company; that "Central Union Cut Plug," manufactured by the United States Tobacco Company, was "exactly the same as the trust 'Winner' used to be" ("Winner" was a brand sold by J. Wright Co. to Continental Tobacco Company); that "Pride of the East," manufactured by the United States Tobacco Company, "is exactly the same as the 'Pride of Virginia' used to be" ("Pride of Virginia" was formerly manufactured by the J. Wright Company, and sold to Continental Tobacco Company); that "U. S. Plug," manufactured by the United States Tobacco Company, is exactly the same as "Master Workman," used to be ("Master Workman" was originally made by J. Wright Company, and sold to Continental Tobacco Company) (a). Another illustration was afforded by the Wetmore Tobacco Company. The manufacturing business of Liggett & Myers Tobacco Company had been sold to Continental Tobacco Company. In less than a year there was organized the M. C. Wetmore Tobacco Company, whose president was M. C. Wetmore, who had been president and in active charge of the sales of Liggett & Myers Tobacco Company. The Wetmore Tobacco Company advertised that it was operated by the president of the former Liggett & Myers Tobacco Company; that it had many of the former operatives of the Liggett & Myers Tobacco Company, and had the

(a) Record, Vol. II, p. 705–6.

formula under which "Star" tobacco (the principal brand of Liggett & Myers Tobacco Company) had been manufactured, and that its goods were exact duplicates of that popular brand (a). Still another illustration is furnished by Scotten-Dillon Tobacco Company, one of the present largest manufacturers of tobacco in the country. In 1899 the Daniel Scotten Company, of Detroit, Michigan, was sold to Continental Tobacco Company by one Oren Scotten, who for a while became a vice-president of Continental Tobacco Company. He entered into a covenant not to re-engage in business for a short time. When his covenant expired Continental Tobacco Company had seen fit, for purposes of economy, to shut down the factory in Detroit; he applied to purchase it, and, as was known by Continental Tobacco Company, intended to use it as a tobacco factory; Continental Tobacco Company, nevertheless, sold it to him (b). In September, 1900, he had organized a corporation named Scotten-Dillon Tobacco Company, and announced to the trade that this concern would shortly "resume business at the old stand, prepared to manufacture a full line of tobaccos; dealers and consumers throughout the United States are acquainted with the quality of the goods manufactured for upwards of twenty years by Daniel Scotten Company, and, as nearly the entire force of employees of former years will be with us, our constant aim will be to place upon the market a superior line of goods" (c).

(a) Record, Vol. IV, pp. 446, 447.
(b) Record, Vol. IV, p. 448.
(c) Record, Vol. II, p. 708.

POINT I.

It is immaterial in this litigation whether the common law as it prevailed in the United States before the passage of the Sherman Anti-Trust Law would or would not condemn the acts of these defendants, as it is also immaterial what the Wilson Tariff Bill (Chap. 349 of Statutes of 1894) provides.

In the court below it was argued by the Government that the several companies aimed at in the Petition are combinations in restraint of trade at common law, and that all of them which are engaged in importing articles which are intended for use in this country are amenable to the provisions of Chapter 349, Statutes of 1894, known as the Wilson Tariff Bill.

It is not apparent how these contentions can have any other than academic interest. The passage of the Sherman Anti-Trust Law seemed to indicate that in the opinion of Congress the common law relating to contracts and combinations in restraint of interstate and foreign trade could not with certainty and convenience be invoked. If the Government cannot sustain itself on the definite and firm ground of the Congressional enactment, it cannot hope to have a better footing on the indefinite and uncertain common law. Whatever differences of opinion may have been expressed by courts as to whether the statute is broader than the common law or not (for instance, whether it forbids only *unreasonable* contracts in restraint of trade, or *reasonable* contracts in restraint of trade as well) no suggestion has been made by any court that after the pas-

sage of the statute there remained any common law to be enforced by a suit in equity brought by, or at the instance of, the Government, applicable to restraints of trade or attempts to monopolize.

It is equally difficult to see that the contentions of the Government receive additional force from the statute known as the Wilson Tariff Act. The purpose of the provisions of the Wilson Tariff Act relied on was evidently to extend the Sherman Anti-Trust Law to the conduct of importers from foreign countries. The language used could mean no more than the more comprehensive language of the Sherman Law. Indeed, if it means more, it is beyond the power of Congress.

This is a case brought under the Sherman Anti-Trust Law (Act of June 2nd, 1890)—Brief statement of its terms.

In an appendix to this brief the Sherman Anti-Trust Law is printed in full, in order that its very words may be easily referred to by one reading this brief. It may be necessary to refer to every one of its provisions and look attentively at every one of its phrases, and even words; but after all the things it declares illegal and forbids, and the effect to be given it in this litigation, require only a line or two to state: It declares illegal every contract, combination or conspiracy, in restraint of trade or commerce among the several states or with foreign nations; it makes guilty of a misdemeanor every person who monopolizes or attempts to monopolize or combines or conspires with another person to monopolize any part of the trade or commerce among the several States or with foreign nations; and it vests the United States Circuit Courts with jurisdiction in equity to prevent and restrain violations of the Act. The other pro-

visions of the Act bear no part in this litigation, except as a consideration of such other provisions, with their phraseology, may throw light on the meaning of the words that are material.

POINT II.

None of these defendants are, or have been, or have entered into, any contract, combination or conspiracy in restraint of interstate or foreign trade.

The facts that bear upon this phase of the case —the question as to the violation of the first section of the Sherman Anti-Trust Law are easy of statement: The defendants are manufacturers of tobacco or some of the products of tobacco. The American Tobacco Company, the principal defendant, is the result of the Merger in 1904 of two tobacco manufacturing concerns (The American Tobacco Company and Continental Tobacco Company) with a third corporation (Consolidated Tobacco Company), which, while it had the power to engage in the business of manufacturing tobacco, had never manufactured or sold it. The American Tobacco Company before the Merger of 1904, was engaged in the manufacture of cigarettes and smoking tobaccos, while Continental Tobacco Company was engaged in the manufacture of chewing tobacco. They were not competitors—the products manufactured and sold by them respectively were not in the nature of the things competitive. This is equally true with respect to the sale of the finished product, and the purchase of raw material. While the products are of tobacco, they are manufactured principally, of different

types of leaf, and in their sale they are only related, not in competition.

This is incontestably a fact and the statement of the merger of the three tobacco companies as an act eliminating any real competition at all is entirely unfounded. This Record does present though instances of the following transaction, to-wit: *Consolidation of competitive manufacturing interests through the formation of a corporation and the transfer to it of the respective properties of such competitors in exchange for stock of the vendee corporation, or for cash.*

In addition to this, the Record presents another transaction, to-wit: *The purchase by a corporation of the property of a competitor directly, or the purchase by such corporation of the whole or a part of the capital stock of such competitor, generally for cash, but sometimes in exchange for shares of the capital stock of such purchasing corporation.*

These are the two principal transactions shown by this Record, and attacked by the Government, but there are presented also in a few cases this transaction, to-wit: *The purchase by a tobacco manufacturing corporation, for cash, of all, or a part of, the capital stock of a corporation engaged in the manufacture of materials used by such vendee tobacco manufacturing corporation (such as wooden boxes, cloth bags, licorice paste and tin foil.)*

There are a very few, rare and exceptional instances, of this transaction, to wit: *The purchase by a tobacco manufacturing corporation, for cash, of all, or a part of, the capital stock of a mercantile corporation engaged in selling at wholesale or retail manufactured tobacco, or the products of tobacco.*

The proof shows no transaction illegal, or even of doubtful legality, unless it be one of these.

The allegations of the Petition of the Government are not proof and to the extent that they go beyond these four typical transactions they are entirely unsupported by proof. As already pointed out in the discussion of facts, one of the notable things in this litigation is the utter failure of proof on the part of the Government as to many of its most emphatic, not to say sensational, allegations.

The opinions of the four Circuit Court Judges do not condemn as illegal the two minor, last mentioned, of these typical transactions, but the decree does so condemn them, and forbids the beneficial holding by the principal defendants of stock in the corporations that manufacture supplies, and in mercantile corporations.

It may as well be stated here as elsewhere that there is no contention that any of the transactions of defendants violated the State laws of their incorporation in that they were purchases of stock of other corporations instead of purchases of the property of such corporations. Each of the defendant corporations that has acquired stock in other corporations incorporated under the laws of any State of the United States, is incorporated under the laws of New York or New Jersey. The statutes of each of these States give express authority to corporations formed under them, to acquire all or a part of the stock of other corporations, (a) and in this these two States only follow what is now the policy of most of the States.

On behalf of the Government it is contended that since the passage of the Federal Anti-Trust Law any competition that ever did exist between those engaged in interstate or foreign commerce cannot legally be eliminated in any way whatsoever; that the rule is inexorable and without exception, and

(a) Dill on New Jersey Corporations, Sec. 51; Harrison on New York Corporations, Sec. 65.

that therefore each of the two first principal transactions above mentioned are violative of law. This contention was adopted by the court below and it is thus tersely and baldly stated by Judge Lacombe:

> "But every aggregation of individuals or corporations, formerly independent, immediately upon its formation terminates an existing competition, whether or not some other competition may subsequently arise. The act as above construed, prohibits every contract or combination in restraint of competition. Size is not made the test. Two individuals who had been driving rival express wagons between villages in two contiguous States, who enter into a combination to join forces and operate a single line, restrain an existing competition, and it would seem to make little difference whether they make such combination more effective by forming a partnership or not. Accepting this construction of the Statute, as it would seem this court must accept it, there can be little doubt that it has been violated in this case * * * each one of these purchases of existing concerns, complained of in the petition was a contract and combination in restraint of a competition existing when it was entered into, and that is sufficient to bring it under the ban of this drastic statute." (a)

On behalf of these defendants it is contended that such transactions do not constitute contracts, combinations or conspiracies in restraint of trade at all; and that:

(a) Record, Vol. 1, pp. 292, 293.

POINT II (Cont'd).—Sub-Point I.

If the transactions shown by this Record were in restraint of trade, they would not be in violation of the Sherman Anti-Trust Law, because such transactions are not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate or foreign commerce, and are therefore not within the provisions of the Sherman Anti-Trust Law, nor, indeed, within the constitutional authority of Congress.

When the Constitution gave to Congress the power to "regulate commerce with foreign nations and among the several States and with the Indian tribes," it manifestly did not intend to give it control over the whole business of the United States, including agriculture, manufacture and mining. The term commerce "describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." (a) Broad as the scope of this term is, and broad as the discretion of Congress within this scope, this court early and emphatically recognized that if the States were to have any functions at all, Congress should not, and constitutionally could not, under the guise of prescribing rules for carrying on "that (interstate and foreign) intercourse," take charge of the whole business of the inhabitants of the country, who are, after all, citizens and residents of the States. Some distinction had to be adopted in the delimitation of the scope of Federal control from

(a) Gibbons *v.* Ogden, 9 Wheat., 1, 189.

the scope of State control, and that distinction for the purpose of this suit may be stated to be that when the transaction in question is an act of interstate or foreign commerce, or directly affects such commerce, it is a transaction subject to Federal regulation; but if the transaction is not an act of such commerce (however so much otherwise the person active in the transaction may be engaged in such commerce), and does not directly affect such commerce, such transaction is subject only to the regulation of the State where the transaction occurred, and is beyond the scope of Federal power.

> "Nor can it be properly concluded that, because the products of domestic enterprise in agriculture or manufacture, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase "foreign commerce" or fairly implied in any investiture of the power to regulate such commerce? A pretension as far reaching as this, would extend to contracts between citizens and citizens of the same state, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country, for there is not one of these vocations the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned." (a)
>
> "Commerce with foreign nations and among the States strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." (b)

(a) Veazie *v.* Moor, 14 How., 568.
(b) County of Mobile *v.* Kimball, 102 U. S., 691.

"It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many States there would be nothing but the lands and real estate to bear the taxes. Some of the western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the southern States. Certainly as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State." (a)

"An excise laid on tobacco, before its removal from the factory, is not a duty on "exports" or "on articles exported" within the prohibition of the Constitution, even though the tobacco be intended for exportation. The case of Coe *v.* Errol, *ante,* cited and applied." (b)

"If it be held that the term (interstate commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry." (c)

"Commerce succeeds to manufacture, and is not a part of it. . . . Contracts to buy, sell, or exchange goods to be transported among several States, the transpor-

(a) Coe *v.* Errol, 116 U. S., 517.
(b) Syllabus to Turpin *v.* Burgess, 117 U. S., 504.
(c) Kidd *v.* Pearson, 128 U. S., 1.

> tation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated but this is because they form part of interstate trade or commerce." (a)

On the other hand, when commodities are in transit from one State to another, or when men are carrying on negotiations which have for their object the transit of goods from one State to another, or which have for their object the sale of goods which necessarily and directly involves such transit in order to complete the transaction, or when the instrumentalities of carrying commodities or persons from one State to another are put in operation—in any of these cases there is interstate commerce, and conduct with respect to them is subject to Federal regulation and control.

> "If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute." (b)

The rules laid down by the *Knight case, supra,* and the *Addyston Pipe & Foundry case, supra,* for determining whether a case does or does not come within the Sherman Anti-Trust Law, were not new rules; they were foreshadowed, on the one hand, as long ago as *Gibbons* v. *Ogden, supra,* and on the other, certainly, as long ago as *Coe* v. *Errol, supra,* and *Kidd* v. *Pearson, supra.* These respective rules, the first emphasized in the *Knight case* and the second in the *Addyston Pipe & Foundry case,* may be stated as follows: (1) Contracts or other transactions operating by their primary and direct effect upon property at a time antecedent

(a) United States *v.* Knight, 156 U. S., 1.
(b) Addyston Pipe & Foundry Co. *v.* U. S., 175 U. S., 211.

to the beginning of its "final movement" from one State to another, are not within the authority of Congress, and so are not covered by the Sherman Anti-Trust Law, whatever their ultimate and indirect effect on trade and commerce; (2) Contracts or other transactions operating by their primary and direct effect upon the "purchase, sale or exchange" of the manufactured commodity among the several States, are within the authority of Congress, and, if in restraint of such trade, are within the condemnation of the Sherman Anti-Trust Law.

There is in the minds of some lawyers (and the opinions of the court below indicate that some judges share the impression) a feeling that the *Knight case* was what might be termed a sporadic decision; that it was, perhaps, not the logical outcome of previous decisions of the court, and that it has been subject to modification by subsequent decisions of the court. Judge Lacombe definitely shows this thought, at least, as to subsequent modification (a); Judge Coxe shows the same view (b); and while Judge Noyes does not so clearly indicate the feeling in any one sentence, a reading of his whole opinion induces the belief that he feels that there has been an impairment of the authority of this first case decided by this court under the Sherman Anti-Trust Law.

It is believed that it has been already shown that the decision in the *Knight case* was not sporadic in the sense that it did not logically follow the previous decisions of this court. On the other hand, its decision was the logical outcome of the previous decisions of this court defining and delimiting the scope of Federal and State authority. That this is so is not only shown by the citations already made, but it is clearly indicated by the decisions

(a) Record, Vol. 1, p. 294.
(b) Record, Vol. 1, p. 300.

of the lower Federal courts immediately preceding it. The decision of this court in the *Knight case* was but an affirmation of the decision of the Circuit Court for the Eastern District of Pennsylvania, where the suit was originally brought, and of the Circuit Court of Appeals for the Third Circuit, composed of Judges Acheson, Dallas and Green, to which the case was carried on appeal from the Circuit Court and from which it was brought to this court. These two subordinate Federal Courts, composed in the aggregate of four eminent Judges, anticipated, because of the previous adjudications of this court, the very grounds upon which this court decided the Knight case. *In re Greene* (a) was decided before the *Knight case;* the opinion in that case delivered by Circuit Judge Jackson (soon afterwards Justice Jackson, of this court) remains one of the most luminous and complete discussions of the Sherman Anti-Trust law that has yet been made by any court—it has been so recognized in opinions delivered by this court; it, in advance of the *Knight case,* announced the same doctrine that was afterwards announced in the *Knight case,* and decided, among others, the same questions decided in the *Knight case* in exactly the same way this court in that case decided them:

> "It is settled by the decisions of the Supreme Court . . . that neither the production nor manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation of their transportation from the State where produced or manufactured prior to the commencement of the actual transfer or transmission thereof to another State constitutes that interstate commerce which comes within the regulating power of Congress."

(a) 52 Federal, 104.

It is confidently asserted that the authority of the *Knight case* has not been challenged directly nor by implication until by the decision of the lower court in the case at bar. Where cases have been held to come within the statute, it has been because the contract, combination or conspiracy under investigation was deemed to bear directly, not upon the article itself or its production, but upon the trade in that article among the several States.

The leading case undoubtedly is *Addyston Pipe & Foundry Company* v. *United States* (a). The combination there had nothing whatever to do with manufacture; it was made between six competing manufacturers of iron pipe located in four different States, and selling pipe in thirty-six States and Territories; the contract provided that certain of the territory in which the defendants dealt should be deemed reserved, that is, that each of the defendants should have the exclusive privilege of filling orders for pipe from the reserved territory allotted to it; the defendants appointed a board to which all inquiries were referred, which fixed the price at which contracts were to be let; in the reserved territory the defendant entitled to fill the order proceeded to fill it at the price fixed by the Board, paying over for distribution among the other defendants a bonus prescribed by the board; in territory not reserved, the privilege of filling the contract was allotted to that defendant which offered the largest bonus; in either case, whether the sale was to be in reserved territory or unreserved territory, the defendants other than the one agreed upon refrained from bidding, or, what was worse, put in fictitious bids larger than the price fixed by the Board. This case affords a clear illustration of a direct restraint of interstate commerce. The thing to be affected by the contract and combination was an interstate sale,

(a) 175 U. S., 211.

and an interstate sale is a part of interstate commerce. The authority of the *Knight case* is expressly recognized.

Montague v. *Lowry* (a) related to a voluntary association composed of manufacturers of tiles, mantels and grates, and of wholesale dealers therein. The dealers agreed to buy only from members of the association, and the manufacturers to sell to others than members of the association only at a price fifty per cent. higher than that fixed for members. The court held that the purchase and sale of tiles between manufacturers in one State and dealers in another was interstate commerce and that the agreement clearly had direct bearing upon interstate sales rather than manufacture. The authority of the *Knight case* is expressly recognized.

In *Swift & Co.* v. *United States* (b) the combination was among persons engaged in buying live stock and slaughtering and selling the meat. The live stock was shipped from without the State for the purpose of being sold and was sold with only the interruption necessary to find a purchaser; the charge was that the defendants refused to bid against each other by agreement, and by agreement obtained excessive shipments by creating a fictitious price for a short time; all the defendants shipped meat to other States, and the further charge was that they fixed by agreement among themselves the price that they would charge for the meat. This case was evidently, in its legal aspect, on all fours with the Addyston Pipe & Foundry case, because the only things affected by the agreement, combination or contract were interstate sales and interstate purchases. The authority of the *Knight case* is expressly recognized.

Shawnee Compress Company v. *Anderson* (c)

(a) 193 U. S., 38.
(b) 196 U. S., 375.
(c) 209 U. S., 423.

was a case in which this court affirmed the decision of the Supreme Court of the Territory of Oklahoma condemning and ordering the cancellation of the lease made by the Shawnee Compress Company to the Gulf Compress Company on the ground that the Compress Company was in restraint of trade in violation of the Federal anti-trust law and the anti-trust law of the Territory. There necessarily arose no question of interstate trade for the transaction was one that occurred in a Territory. The *Knight case* is not mentioned.

Loewe v. *Lawlor* (a) presented a case in which, as summarized by the court, it appeared that defendants combined not merely to prevent the plaintiffs from manufacturing articles intended for transportation beyond the State, but to prevent the vendees from reselling the commodities that they respectively imported from beyond the State, and to prevent the purchase and transportation of such commodities to various places of destination in other States; that they had attempted to induce purchasers in other States to break contracts for the purchase of such hats; that they had formed a combination to directly restrain plaintiff's trade, that certain means to obtain such restraint were contrived to be used and were used to the injury of plaintiff's property and business. Unquestionably this was a case differing from the others, but it is no more under the principles of the *Knight case* than they. The transaction complained of was direct in its effect and restraint upon interstate commerce. Under the thoroughly logical analysis of the first section of the anti-trust law given by Mr. Justice Holmes in his dissenting opinion in the *Northern Securities case*—this analysis is not the subject of dissent, though—this was a typical case of a conspiracy in restraint of trade—a combination to "keep strangers to the business out of the busi-

(a) 208 U. S., 274.

ness" (a). Such conspiracies are, undoubtedly, usually made by rivals in business against the persons intended to be injured, but they are not necessarily so. This case expressly recognizes the authority of the *Knight case.*

Continental Wall Paper Company v. *Voight* (b) was a case in which numerous wall paper manufacturers, without disposing of their manufacturing plants at all, and with no other object than to influence interstate sales and their prices, caused the organization of a selling company, which selling company had for its one purpose and effect the elimination of competition between the otherwise independent concerns, and refused to permit any of its associated manufacturing concerns from selling to merchants who did not buy exclusively from or through it. This was the *Addyston Pipe and Foundry case* repeated, with some aggravating circumstances. The whole purpose of the agreement and transaction was to affect interstate sales and its only effect, direct or otherwise, was upon such. This case does not mention the *Knight case.*

These are the only cases involving ordinary commodities or industrial corporations that it can be suggested have in any way impaired the controlling authority of the *Knight case.* It is earnestly and confidently insisted that they have no such effect.

Besides these cases involving articles of merchandise the Anti-trust Act has been before the Supreme Court in three notable cases involving transportation companies. In the first two of these cases, *Trans-Missouri Freight Association case* (c) and *United States* v. *Joint Traffic Association* (d), the court sustained the contention that transportation

(a) 193 U. S., 406.
(b) 212 U. S., 227.
(c) 166 U. S., 290.
(d) 171 U. S., 505.

companies are amenable to the provisions of the Sherman Anti-Trust Law and that an agreement between two competing transportation companies fixing their charges for service in transporting merchandise from one State to another is violative of the statute.

The third of these transportation cases is the *Northern Securities case* (a), which held that where two transportation companies were forbidden by earlier decisions to agree upon rates, and each forbidden by law to purchase the other, the stockholders could not lawfully consolidate them, and eliminate competition between them by the creation of a holding company which was in effect a mere trustee to accomplish the unlawful purpose of consolidation and whose stock certificates were, in practical effect, merely trust, or pooling, certificates.

These three transportation cases are interesting, but they cannot be said to have the influential connection with this litigation that cases involving merchandise have. In the first place transportation companies are engaged simply and solely in commerce, whereas a manufacturer may, or may not, engage in commerce, and if he engages in commerce at all he may make it interstate commerce, or confine it to the State where his factory is located. In the second place—and all courts are influenced by the consideration — transportation companies exercise a public franchise and owe the duty of continued competitive existence, whereas manufacturers of commodities owe no duty of continued existence at all.

The *Knight case* has not only not been overruled or modified by subsequent decisions of this Court, but it has been strengthened (if an unmodified opinion of this Court is capable of being strengthened) in its authority.

(a) 193 U. S., 197.

Hopkins v. *United States* (a) was an effort to have the Kansas City Livestock Exchange declared to exist in violation of the Sherman Law and to enjoin from entering into or continuing in combinations alleged to deprive people engaged in shipping livestock to Kansas City from other States of free access to the market at Kansas City. The Court held that the transaction, although it might affect interstate commerce and result in increasing the cost of conducting such commerce, was not under the jurisdiction of Congress because the transactions complained of were directly and immediately local to the State of Missouri, whereas, in order to bring the transaction under the domain of Congressional power it must be direct and immediate in its affect on interstate commerce. The *Knight case* was expressly cited and relied upon.

Anderson v. *United States* (b) was a case under facts somewhat similar to the *Hopkins case* (*supra*) involving a livestock exchange at Kansas City, in which it was held that the agreement and transaction complained of would not have been violative of the Sherman Law under any circumstances; but it was held also that although it had to do with the purchase of cattle in Kansas City, brought from other States, it did not fall within the Sherman Anti-Trust Law nor within the power of Congress because it did not directly relate to and act upon and embrace interstate commerce.

In *Field* v. *Barber Asphalt Company* (c) this Court, through Mr. Justice Day, said:

> "In this day of multiplied means of intercourse between States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce, but it is only direct interference with the freedom of such commerce that brings

(a) 171 U. S., 578.
(b) 171 U. S., 604, 616.
(c) 194 U. S., 618, 623.

> a case within the exclusive domain of Federal jurisdiction. The attempt to invoke the provisions of the Sherman Act in this case is equally unavailable. That act has been recently considered in the Northern Securities case, decided at this term, and its construction and the nature of the remedies under it, determined. It is not intended to affect contracts which have a remote and indirect bearing upon commerce between the States."

In *Ware* v. *Mobile County* (a) Mr. Justice Day, again speaking for a unanimous court, not with reference to the Sherman Law, follows exactly the logic of the *Knight case* in discussing the application of Federal or State control.

> "When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers.
>
> "These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases where the policies are ordered and delivered in another state than that of the residence and office of the company."

The authority of the *Knight case* in the lower federal courts has been, of course, generally recognized. It is not necessary and, perhaps, would not be proper, to multiply citations of these cases, but it is not deemed improper to specially refer

(a) 209 U. S., 405.

the Court to the very recent case of *Bigelow* v. *Calumet Co.* (a), in which Judges Lurton and Cochran, Judge Severens concurring, show in a clear and forceful way the continued authority of the *Knight case* and its application and effect in a transaction very similar to many of the transactions shown by this record.

Though well known in all its details to all judges and most lawyers, in order to preserve the completeness of this brief and argument, it is well to state in detail what the facts and decision in the *Knight case* were: The facts were not in dispute, they were determined and declared by the lower court on the pleadings and testimony, and were, in short substance, as follows: The American Sugar Refining Company was a New Jersey corporation with authority to purchase, refine and sell sugar. It had, prior to March, 1892, obtained control of all the refineries in the United States (presumably located in numerous different States) excepting four located in Philadelphia and one in Boston, the latter producing about two per cent. of the sugar refined in this country; the products of all these refineries were sold and distributed among the several States, so the American Sugar Refining Company and the owners of the other refineries were engaged in interstate commerce in sugar. In March, 1892, American Sugar Refining Company entered into contracts with stockholders of the four Pennsylvania companies whereby it purchased their stock, paying for it in its own stock in agreed proportions; after this purchase, for reasons of economy in conducting the business, these separate Philadelphia refineries were consolidated, or operated in conjunction with plants already owned by the American Sugar Refining Company; the price of refined sugar had been slightly advanced after the

(a) 167 Fed., 721.

purchase but it was still, at the time of trial, lower than it had been some months before the purchase; the object of the American Sugar Refining Company in purchasing the Philadelphia Refinery was to obtain a greater influence or more perfect control over the business of refining and selling sugar, throughout the United States. The charge of the Government's petition, upon these facts, was that these contracts of purchase constituted a combination and conspiracy in restraint of interstate trade, entered into by the individual vendors and corporation vendee, and that the purchases constituted a monopolizing and an attempt to monopolize the manufacture and sale of refined sugar among the several States. The relief sought was a breaking up of the combination thus formed, and the means of such breaking up suggested by the Petition was that the American Sugar Refining Company be required to restore to the individual vendors their stock in the Philadelphia refineries, and that the individual vendors be required to restore to the American Sugar Refining Company the stock of such American Sugar Refining Company which they had respectively received in payment for their stock in the Philadelphia refineries. The Petition also prayed for general relief. The case was originally tried before District Judge Butler, who dismissed the Bill on the ground that the facts did not show a contract, combination or conspiracy to restrain trade or commerce, or a monopolizing or attempt to monopolize trade or commerce "among the several States or with foreign nations," and distinctly placed his decision (a) upon the holding that even if admitted that there did exist a combination in restraint of trade or an attempt to establish a monopoly, the transaction was a State and not a Federal matter, because, whatever the motive of the vendee, the thing shown was the pur-

(a) 60 Fed., 306.

chase of one, or a number of manufacturing plants, which manufacturing plants were, of course, located in a State, and not in transit from State to State. This decision was affirmed on the same ground by the Circuit Court of Appeals composed of Judges Acheson, Dallas and Green (a), and was further affirmed on the same ground by the Supreme Court of the United States in an opinion delivered by Chief Justice Fuller, concurred in by all the Justices, except Justice Harlan, who dissented.

No attempt need be made to broaden the logical scope and intendment of the decision in the *Knight case*. The transactions disclosed by this record fall as completely within it as transactions in a case at bar will ever fall within the doctrine of a case decided. These defendants are essentially and primarily engaged in the business of manufacturing tobacco, as the American Sugar Refining Company was in the manufacture of sugar. No charge is made that The American Tobacco Company or any defendant has restrained or monopolized interstate trade by becoming a selling agent for other and naturally competing manufacturers. The gist of the offense charged by the Government and found by the court below, is: The acquisition of factories of competitors engaged in the manufacture and sale of tobacco. The gist of the offense charged by the Government in the *Knight case* was of exactly the same import, to wit: The acquisition of refineries of competitors engaged in the refining and sale of sugar. Attempts to differentiate the case at bar from the *Knight case* seem to us strained and artificial.

FIRST:—It has been suggested that the *Knight case* would have been decided differently if the Government had asked for a different relief—as for in-

(a) 60 Fed., 934.

stance, a holding that the American Sugar Refining Company was an unlawful combination not authorized to engage in interstate commerce. The answer to this is that the Government did ask for general relief, and under that prayer was entitled to such relief, not inconsistent with the relief specially prayed, as it was entitled to upon the facts; that the relief asked, to wit: the disruption of a single series of agreements made recently before the bringing of the suit, was the most logical and reasonable relief that the Government could have asked—infinitely more reasonable than to stay, in the name of freedom of competition, the activities of a large manufacturing and producing corporation; finally, every court that considered the case expressly refused to consider the matter of remedy at all, but planted its decision squarely on the holding that the Sherman Anti-Trust Law did not, and that Congress could not, prevent or condemn the purchase by a manufacturer of an additional factory, even though such purchase had been induced by a desire to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country, and had that effect.

SECOND:—It has been said that there is nothing in the facts of the *Knight case* emphasizing the business of making interstate sales of sugar carried on by the American Sugar Refining Company, and nothing to indicate that it made interstate purchases of raw materials, whereas the record of the case at bar discloses the great volume of the interstate sales and purchases by these defendants. But the opinion of the Court is express in its recognition and declaration that there did exist interstate business. As shown by the Record in this Court the petition filed by the Government in the *Knight case* was full of allegations showing the vol-

ume of interstate business done by the defendants in sugar and these allegations were admitted by the answers as of course they had to be. Interstate business in selling an article of merchandise does not exist without commercial agents and the other machinery of merchandising, and it is not respectful to this Court to intimate that it was inadvertent to the fact that American Sugar Refining Co. had such commercial agents and all other commercial machinery from one end of the land to the other. American Sugar Refining Company had its home in New Jersey; it bought four factories in Pennsylvania; it had one competitor in Boston—in none of these sections does the raw material for making sugar grow—under such conditions the Court could not fail to realize the enormous volume of interstate and foreign purchases by the American Sugar Refining Company of its raw material raised in various States of the United States and in foreign countries.

THIRD:—It has been said that the *Knight case* did not present an instance of a corporation organized to take over the competing refineries, such instances as are presented by some of the transactions in the case at bar, but that in that case there was only the purchase by a large going concern of additional plants. The answer to this attempt to distinguish the two cases is that the Supreme Court distinctly and in words declines to even discuss that distinction:

> "In the view which we take of the case we need not discuss whether because the tentacles which drew the outlying refineries into the dominant corporation were separately put out, therefore there was no combination to monopolize." (a)

(a) 156 U. S., 10.

In the second place, those who attempt to draw this distinction have lost sight of what was the basis of the court's decision. It may be (and that it is so will be earnestly argued later in this brief and argument) that the purchase by one of the business of a competitor is not a combination in restraint of any trade, whether such trade be interstate or otherwise; but the decision by this court of the *Knight case* does not operate either for or against that contention. The decision in that case was that manufacture is not commerce and that changes of ownership of manufacturing plants are not within the power of regulation of Congress, and this, although the products of such manufacturing plants are destined in all human probability to become subjects of interstate commerce. This being the holding, how does it affect the matter of Congressional authority and the limitations of the scope of the Sherman Anti-Trust Law, or other Congressional enactment, whether changes in ownership of manufacturing plants occur in one way or another—whether such change results from the partnership of previous owners, as is frequent among merchants and manufacturers; or the marriage of previous owners, as is frequent between the owners of farming lands as well as other property; or the formation of corporations by previous owners into which they put their respective farms, factories, mines or stores; or the purchase by one farmer, manufacturer, miner or merchant of the farm, factory, mine or store of his competitor?

There exists confusion in some minds in failing to distinguish between the person complained of, and the transaction which is the basis of the complaint. It has been assumed that the *Knight case* was decided as it was because the court held that the American Sugar Refining Company was not engaged in interstate commerce, and that *Loewe* v. *Lawlor* (*supra*) having enforced the Sherman Law

against persons not engaged in interstate commerce has reversed, or in some way modified, the decision in the *Knight case.* This view has at one time or another induced the Government in the case at bar, and induced some of the judges in the court below, to enter into arguments to show that the defendants in the case at bar are engaged in interstate commerce. No argument need be made that the defendants represented in this brief and argument are engaged in interstate commerce. There may be a technical question as to whether a manufacturer who delivers goods in the town where his factory is located to a common carrier with the understanding that the purchaser is in some foreign state and that the title passes upon the delivery to the common carrier, is by such act doing an act of interstate commerce; but there is no question that when The American Tobacco Company and other tobacco, cigar and snuff manufacturing companies send drummers into foreign States to solicit orders to be filled by shipments from without that State, and when they ship tobacco purchased on the market in one State to a factory in another, and when they do various other acts that they do daily, are engaged in interstate commerce. American Sugar Refining Company, the principal defendant in the *Knight case,* selling as it did ninety-eight per cent. of the refined sugar sold in this country, with relations with wholesale grocers in every city and almost every hamlet in the land, and buying from foreign countries and the extreme Southern States the raw material for its refined sugar, was undoubtedly, also engaged daily in interstate commerce. It is true, of course, too, that the defendants in *Loewe* v. *Lawlor* (*supra*), employees, or ex-employees, who worked, or had worked, in a hat factory in Danbury, Connecticut, or other hat factories, were not engaged in interstate commerce. And yet the American Sugar Refining Company was acquitted, and the employees of the hat factories were

convicted of restraining interstate trade. The solution of the matter is not difficult: *The question is not whether the defendant is engaged or not in interstate commerce, but whether the transaction complained of is an act of, or direct in its effect on, interstate commerce.* The act complained of in *Loewe* v. *Lawlor* was that those hatters, not engaged in interstate commerce at all, conspired to restrain and destroy the interstate commerce of people who were so engaged—the transaction was direct in its effect on interstate commerce, and so the actors in that transaction were convicted, though they never, perhaps, engaged in interstate commerce in their lives. The American Sugar Refining Company was acquitted because, while it was undoubtedly engaged in interstate commerce daily, the transaction complained of was a mere purchase of a manufacturing plant, a transaction controllable only by the State where the transaction occurred, or the State of residence, or citizenship, of the vendor or vendee.

This court has, in the very recent case of *Howard* v. *Railroad Company* (a) (the Employers Liability case) considered the very matter that is the basis of this misconception. The Government contended in favor of the validity of the statute imposing a liability on employing railroad companies for injury to employes, even when the servant was injured in commerce not interstate, that (b)

> "by engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress and cannot be heard to complain of such regulation."

To this contention this court through Mr. Justice White made forcible reply. (c)

> "It remains only to consider the contention which we have previously quoted, that

(a) 207 U. S., 463.
(b) 207 U. S., 499.
(c) 207 U. S., 502.

the act is constitutional, although it embraces subjects not within the power of Congress to regulate, because one who engages in interstate commerce thereby submits all its business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters, which, from the beginning have been, and must continue to be under their control so long as the Constitution endures."

It is said, however, that the business of defendants and other manufacturers of tobacco does not consist alone of the manufacture of tobacco, but that the manufacture of tobacco is a comparatively small part of such business; that the business may be divided into three features or factors, to wit: the purchase, as a part of interstate commerce, of raw materials and supplies, the manufacture of the product, and the disposition in interstate commerce of the manufactured article; that the second function or feature is the only one that does not affect interstate commerce (a). Undoubtedly this is true with

(a) Opinion, Judge Noyes, Rec., Vol. 1, p. 307.

respect to tobacco, and undoubtedly it is just as true, and appeared in the *Knight case* to be just as true, with reference to the refining of sugar. The refiner of sugar bought, in interstate commerce, his raw material; he refined it in his local factory or refinery; and he distributed and sold it in interstate commerce—the second function being the only one that did not affect interstate commerce. This, however, did not alter the fact that the subject matter of the purchase was a plant for refining sugar, with the good will of such plant, and the stock on hand; that neither the plant, the good will thereof, nor the stock on hand was the subject of interstate commerce which could be regulated under the Federal Act until embarked upon interstate transit, and that the evident intent so to embark any part of the property purchased was insufficient to turn any of such articles into articles of commerce, or the act of acquiring them into an act of, or directly affecting, interstate commerce. A vice of the argument lies in the assumption that in the purchase by one manufacturer of the factory of another, or in the consolidation by various manufacturers of their respective factories, there is a purchase or consolidation of the property, the privilege, of purchasing in interstate commerce raw material and of selling in interstate commerce the manufactured product. It is true that the business of a tobacco manufacturing concern, or a sugar refining concern, in a broad sense, includes the purchase of the raw material, the manufacture of the finished product and the sale in intrastate, interstate and foreign commerce of the manufactured product. When a purchase is made, however, a distinction must be drawn. The purchaser does not buy the right to sell the product of the factory in another State; that is his as an incident of ownership. Although it may be said loosely that one buys a "business," all that he really gets by his purchase is the tangible property and its

good will. Certainly he does not get by his purchase any portion of interstate commerce in the article dealt in, so that it may be said that such commerce is directly affected. All of this is equally true whether the purchase is made as ordinarily understood, or whether it is made as the result of consolidation among the previous owners of the manufacturing plants.

All of the foregoing argument and the principles enunciated by the *Knight case* are equally applicable to the first of the minor typical transactions shown by this Record as to the two major typical transactions. This minor transaction is the purchase by a tobacco manufacturing corporation, for cash, of all, or a part of, the capital stock of a corporation engaged in the manufacture of materials used by vendee tobacco manufacturing corporation, such as wooden boxes, cloth bags, licorice paste and tin foil. These material manufacturing corporations are, after all, mere manufacturers. The purchase is the purchase of the whole of, or an interest in, a manufacturing concern—a factory. The articles manufactured may, or may not, become the subject of interstate commerce, dependent upon the will of the vendee of the factory. The transaction affects the property antecedent to its entering into transit from State to State, and therefore, so far as it affects interstate commerce at all, such affect is indirect and not such as to bring it within the statute.

The argument already made, and the principles of the *Knight case*, are also equally applicable to the second of the minor transactions shown by this record, to wit: the purchase by a tobacco manufacturing corporation for cash of all or part of the capital stock of a mercantile corporation engaged in selling, at wholesale or retail, manufactured tobacco, or the products of tobacco. There are very few of

these transactions shown in this record, but each of them involves the purchase of an interest in real estate or a leasehold, in which the mercantile establishment is conducted, the stock of merchandise on hand and the good will of the business. So far as retail mercantile establishments are concerned, there is no element of present or future interstate commerce—they sell goods over the counter. So far as wholesale mercantile establishments are concerned, there may or may not be interstate commerce, depending upon the locality and the extent of business of such wholesale mercantile establishment; but whether there is or not it is a future business, to be engaged in or not as the vendee, or then owner of the business, determines, and transactions which have to do with the ownership of the articles of merchandise preceding their entering the channels of interstate shipment or transportation, do not directly affect interstate commerce, and are, therefore, not subject to the provisions of the statute or any other congressional enactment.

POINT II (Cont'd).—Sub-Point II.

The transactions shown by this record do not constitute contracts, combinations or conspiracies in restraint of trade, without respect to whether the trade is interstate, foreign or otherwise.

It is unquestionably true that the formation of a partnership by individual competitors, the consolidation of competing corporations, the purchase, whether for cash or for stock of a farm, mine, mercantile establishment or factory of a competitor, terminates an existing competition, and if, as held by the court below, this Sherman Anti-

Trust Law has established the rule "Once a competitor, forever a competitor," then each of these transactions is (but for the limitations on the authority of Congress already discussed, and enforced in the *Knight case,*) an infraction of the act. It will not do to say that in order to violate the law the lessening of competition by the particular transaction must be considerable—the law, as pointed out by Mr. Justice Holmes, "hits every contract or combination of the prohibited sort, great or small" (a). This proposition is so startling, so revolutionary, and leads to such destructive results as to at once suggest that Congress could not have intended so radical a measure. Can it be true that as stated by Judge Lacombe, "it would seem to make little difference whether they make such combination more effective by forming a partnership or not."

A contract in restraint of trade was well known at common law, and a conspiracy to injure the trade of another, or exclude another from trade, was well understood at common law. The purpose of Congress in passing the Sherman Law was principally to apply to interstate transactions the rules of the common law, and to affect them with the policy of general State legislation. As Mr. Justice Harlan said in the opinion of the Court in the famous *Northern Securities case* (b):

> "Indeed, when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than to apply to interstate commerce a rule that had been long applied by the States when dealing with combinations that were in restraint of their domestic commerce."

And yet at common law, and under the law as administered in certainly most of the States, the terms used in the Sherman Law have always signified concert of action between those whose owner-

(a) 193 U. S., 402.
(b) 193 U. S., 197.

ship was independent of each other, and not that elimination of competition which comes from mere change of ownership of property.

In *Fairbanks* v. *Leary* (a) the Supreme Court of Wisconsin said:

> "Of course it does not require argument or citation of authority to show that five or any other number of men may lawfully form a copartnership to buy the produce of the country . . . The law does not and did not require that these parties should compete in the purchase of produce."

In *People* v. *North River Sugar Refining Company* (b) the Court of Appeals of New York, in discussing an unincorporated partnership between corporations and the contention that this was valid because there might under the statute of New York have been a consolidation of those corporations, and that the scheme attacked was the same in its effect, said:

> "Under the statute the resultant combination would itself be a corporation deriving its existence from the State, owing duties and obligations to the State, and subject to the control and supervision of the State, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owning no corporate allegiance. Under the statute the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not as here a capital stock double that value at the outset and capable of an elastic and irresponsible increase. The difference is very great and serves further to indicate the inherent illegality of the trust combination. . . . It is not a sufficient answer to say

(a) 40 Wis., 637.
(b) 121 N. Y., 583.

that similar results may be lawfully accomplished."

In *Trenton Potteries Company* v. *Oliphant* (a) the Court of Errors and Appeals of New Jersey, in answer to the contention that corporations had no right to destroy competition by the purchase of a competitor, said:

> "Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. . . . It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish or, for a time at least, destroy competition. Contracts for such purchases cannot be refused enforcement."

A few of the other cases that sustain the contention here made as to the public policy of the States as shown by the common law obtaining in them, and their respective statutes, are given below (b).

There is a circumstance that shows conclusively that it is no part of the public policy of the States of this country to preserve competition by preventing the consolidation of every competitive interest. Unless some additional States have passed such statutes—printed below in a note is a list of the States of the United States that by express statutory provision provide for and facilitate the merger

(a) 58 N. J. Eq., 507.

(b) Cameron *v.* Water Co., 62 Hun, 269.
Vinegar Co. *v.* Foehrenback, 148 N. Y., 58.
Dittman *v.* Distilling Co., 64 N. J. Eq., 544.
Com. *v.* Hunt, 4 Metc., 111.
Oakdale Co. *v.* Garst, 18 R. I., 484.
Macauley *v.* Tierney, 19 R. I., 225.
Bohn Co. *v.* Northwestern Assn., 54 Minn., 223.

and consolidation of corporations engaged in the same line of business—competing corporations. (a) This list does not include States that in their provisions for amendment of corporation charters and reorganization of corporations, recognize as legal and desirable the consolidation of existing corporations. An examination of the list discloses not only that these States are numerous, but that the number embraces many of the leading commercial States, and that the statutes are not old and obsolete statutes indicative of a past public policy—every statute is, so far as known, still in force, and many of them are recent steps in the development of the corporation law of the various States, intended to meet modern business conditions and needs. The New Jersey Merger Statute, identical with the Mer-

(a) Alabama: Code of Alabama, 1907, Secs. 3502-08.
California (applicable to mining corporations only): Civil Code of Cal., 1906. Secs. 290, 587a.
Colorado: Gen. St. 1883, Secs. 349, 350.
Connecticut: P. A., 1903, C. 194, Secs. 75-79.
Delaware: Gen. Corp. Law of 1899, as amended, Secs. 59-64.
Indiana: Acts 1903, pp. 405-409.
Kentucky: Ky Stat., 1903, Secs. 555, 56, as amended in 1902, and Sec. 558.
Maryland: Rev. Corp. Act, 1908, Secs. 29-31.
Missouri: Rev. St., Sec. 1334; Rev. St., 1899, Sec. 2786e.
Montana (applicable to mining corporations only, but there is reference to consolidation of other corporations): Civil Code, 1895, Secs. 524, 527, 1015.
Nevada: Gen. Corp. Law, 1903, Secs. 43-45.
New Jersey: An Act concerning corporations, revision 1896, Secs. 104-109, and P. L., 1902, p. 700.
New Mexico Territory: An Act to regulate the formation and government of corporations for mining, manufacturing, industrial and other pursuits (1905) as amended, Secs. 109-115.
New York: Consolidated Laws 1909, pp. 247-250, and p. 4223.
Pennsylvania: Laws 1901, p. 349, and Laws 1905, p. 95.
Utah: Compiled Laws 1907, Secs. 340, 341.
Virginia: Corporation Act of 1903, C. 5, Secs. 40-46.

ger Statute of New York, and identical with the statutes of many of the other States, may be treated as typical. It provides, in short substance, that two corporations engaged in similar businesses may consolidate; that the consolidation is to be by prearrangement of the directors, confirmed by the stockholders of the theretofore competitive and now merging corporations; that this agreement of merger shall provide how, and on what basis of exchange, the securities of the old competing corporations shall be taken up by the securities of the consolidated corporation to be formed; that a stockholder who does not care to enter into the consolidated corporation may have the value of the securities held by him in the old company appraised and paid for in cash; the contract of consolidation, thus made by the hitherto competing corporations, becomes the charter of the new company, which new company by virtue of the agreement is vested with all the property and rights, and becomes subject to all the liabilities of the old corporations, and the old corporations themselves pass out of existence.

No one can conceive of a corporation that under the contention of the Government would be a more typical combination in restraint of trade than the consolidated or merged corporation whose formation is thus expressly authorized and facilitated by the laws of the most of our leading commercial States. In the first place, the two merging corporations are, in their charter powers and purposes at least, competitors and under a recent decision of the New Jersey Court of Errors and Appeals (a) they must be under their charters at all points competitors in order to take advantage of the statute at all. In the second place, there is not contemplated the purchase for cash of the property of one by the other, but the stock-

(a) Colgate *vs.* U. S. Leather Co., 72 Atl. Rep., 126.

holders in each receive for their larger interest in the smaller company a smaller interest in the larger company—they simply change their investment — and this, in the opinion of Judge Noyes, of the court below, is the distinction that makes a criminal of one corporation vendee, as against the innocence of another. In the third place, the consolidation is not effected in ordinary course of business by the purchase by one concern of another, even for stock, but it is a consolidation prearranged by the separate owners of the competing businesses—and this fact, according to the contention of the Government and in the opinion of some text writers and magazine writers, makes for infraction of the law.

It is difficult to argue that such a transaction is against the public policy of the States when it is not only not forbidden but directly encouraged and facilitated by the statutes of so many States, contemplated by the statutes of others, and not forbidden by the statute law of a single State; and is there not an element of incongruity, approaching absurdity, in the contention that seventeen States encourage their corporations to take steps which, when taken, will result in the formation of a corporation that is immediately and by the very essence of its being an outlaw of commerce?

It is to be noted that some of the States that have these merger statutes have anti-trust laws which in general forbid the things that are forbidden by the Sherman Anti-Trust Law (a). This

(a) Alabama Const., Sec. 103 and C. 69, Code 1907, Secs. 2487, 2488, 7579-7582.
California: "Cartwright Anti-trust Bill" appd. Mch. 23, 1907.
Indiana: Burns Rev. St. 1901, Secs. 3312g, 3312h, 3312m, 3312n, and Laws of 1907, c. 243.
Kentucky: St. 1903, Secs. 3915-3921.
Maryland: See Sec. 41 Const.

shows that the policy of these States is to forbid in intrastate trade the things that in interstate trade are forbidden by this Act of Congress. To adopt the construction of the Sherman Anti-Trust Law contended for by the Government, and then to carry this construction into similar State statutes emphasizes the confusion and incongruity of the condition that would arise—States encouraging and facilitating by one set of statutes the formation of corporations which, by another set of statutes, are forbidden to exist.

The point here being made is that, whatever the reason may be, it is not a part of the common law, nor a part of the public policy of the States, to condemn that elimination of competition which comes from the consolidation by purchase or otherwise of property that had formerly been used in competition, but only to forbid that elimination of competition that comes from agreed concert of action between those whose ownership continues independent of each other. The reasons for this distinction are not necessary to be given at length, but they are not hard to find: When there is a consolidation of ownership there is created either a corporation deriving its power from the State, and subject to its control or supervision, or there remains an individual subject to this control, whereas agreed concert of action is in its nature irresponsible. Again, there are positive benefits of economy and efficiency, increased enterprise and increased capital, that come from consolidation—("The com-"bination of capital in large plants to manufacture

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Missouri: Rev. St. of 1899, as amended 1907, Secs. 8965-8968.

Montana: See Const. Art. XV, Sec. 20.

New York: Stock Corp. Law as amended by c. 384, Laws 1897, Sec. 7, and Laws 1899, c. 690, Secs. 1-7.

Utah: Const. Art. 12, Sec. 20, and Rev. St. 1898, Secs. 1752-1762.

"goods with the greatest economy is just as neces-
"sary as the assembling of the parts of a machine
"to the economical and more rapid manufacture of
"what in old times was made by hand.")—whereas agreed concert of action in the marketing of goods, without other consolidation of interests, has no possible trade or public advantage, but has for its only natural result the ultimate increase of prices.

Not only do the common law and public policy, as shown by the statutes and decisions of the various States, not require that competition once established must forever continue—not only do they not forbid consolidation into one ownership of property theretofore owned by several, although such consolidation eliminates competition previously existing among the previous owners—but the Sherman Anti-Trust Law itself has no such purpose or result, and has never been deemed by this court or the inferior Federal courts to have it until the decision of the lower court in the case at bar.

In the *Trans-Missouri Freight Association case* (*supra*) this court held that the Sherman Anti-Trust law embraces and forbids *every contract and combination* in restraint of trade, whether reasonable or unreasonable. In the *Joint Traffic Association case* (*supra*) a strong argument was made to induce the court to change this holding, the contention being that under such holding partnerships and corporations could not be formed for business having direct relation to interstate commerce and commerce would be paralyzed. This court did not modify its holding, but it said that the forebodings and predictions of the disastrous effect of the enforcement of the Sherman Law were not justified.

> ". . . we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same

> may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.
>
> "We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term, and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business." (a)

This language of Mr. Justice Peckham, speaking for the court, is significant. It is that the various things mentioned have never "been regarded *in the nature* of a contract in restraint of trade or commerce." The court is not speaking simply of interstate and foreign commerce; its words reach back and were intended to reach back to a period before the passage of the Sherman Anti-Trust Law, to the beginning of the law on the subject.

In the *Northern Securities case,* Mr. Justice Brewer, in an opinion concurring with the court, and written to prevent anything that might tend to

> "unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation," (b)

(a) 171 U. S., 505, 567-8.
(b) 193 U. S., p. 364.

held that

> "Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy." (a)

This court has incidentally from time to time taken it for granted that there is nothing in the Sherman Anti-Trust Law, or any other Federal legislation, that prevents the consolidation of property rights, or the transfer of property rights, although such consolidation or transfer is effective to diminish or eliminate competition. For instance in *Smiley* v. *Kansas* (b), in which an agreement between competing grain dealers is condemned under a State statute, Mr. Justice Brewer, speaking for the court, said:

> "Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed *without any merging of interests through partnership or incorporation, is one to which the police power extends.*"

(a) P. 361.
(b) 196 U. S., 447.

In *National Cotton Oil Co.* v. *Texas,* (a) Mr. Justice McKenna, speaking for the court, dealt with some of the contentions of defendant as follows:

> "To support the argument the usages and necessity of business are adduced, and partnerships and their effect are brought forward as illustrations. There are some things which counsel easily demonstrate. *They easily demonstrate that some combination of 'Capital, skill or acts' is necessary to any business development, and that the result must inevitably be a cessation of competition.*"

In *Cincinnati Packet Co.* v. *Bay* (b) there was involved the sale by one competitor to another of a steamboat property—one of the very instrumentalities of commerce—accompanied by a covenant by the vendor not to engage in competition. The court assumed that the sale was valid, although there was thereby an actual competition eliminated, and sustained the vendor's covenant.

Mr. Justice Holmes, speaking for a unanimous court, said:

> "Presumably all that there was to sell, beside certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' name. This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from any one, we believe, that such a contract, made as part of the sale of a business and not as mere device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute."

In the lower Federal courts there have been the same incidental as well as express holdings too

(a) 197 U. S., 115.
(b) 200 U. S., 179.

numerous to be here quoted in full. To illustrate: The Circuit Court of Appeals for the Sixth Circuit, composed of Judges Lurton, Day (now Mr. Justice Day of this court), and Severens, in *Chesapeake & Ohio Co.* v. *U. S.*, (a) speaking through Judge Day, said:

> "Looking then to the contract in question, we find 14 of the coal producers of this district . . . entering into an agreement which, *without making a partnership*, undertakes to control the entire output of the several mines for shipment west by a leading route."

In *Davis* v. *Booth* (b), the same court, speaking through Judge Severens, said:

> "There is a clear distinction, which seems to be lost sight of in the argument here, between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination."

In addition to these two cases indicating the views of the lower Federal judges, reference is respectfully made to the case of *Bigelow* v. *Calumet Mining Co.*, heretofore referred to and the cases cited in the note (c).

Against all of these cases, certainly indirectly indicating and directly declaring the legality of the elimination of competition that comes from the consolidation into a common ownership of the

(a) 115 Fed., 610, 620.

(b) 131 Fed., 31, 37.

(c) Robinson *v.* Brick Co., 127 Fed., 804.
Connor-McConnell Co. *v.* McConnell, 140 Fed., 412; aff., *idem*, 987.
Fisheries Co. *v.* Lennen, 116 Fed., 217.
Harrison *v.* Glucose Co., 116 Fed., 304.
National Co. *v.* Haberman, 120 Fed., 415.

property of those previously competitors, as well as the elimination of competition which comes from a *bona fide* purchase by one competitor of another, it is contended that the *Northern Securities case* is to prevail; that under the decision of this court in that case a contract and combination in restraint of trade is effected by the mere acquisition of property, and is to be prevented by enjoining the vendee of the property thus illegally conveyed from enjoying its use.

The first thing that suggests itself is that this court has not so treated its decision in the *Northern Securities case*. *Smiley* v. *Kansas, National Cotton Oil Company* v. *Texas,* and *Cincinnati Packet Co.* v. *Bay,* cited above, were all decided by this court subsequent to its decision in the *Northern Securities case*. There is no intimation in any of these that the words cited herein are in conflict with the decision of the *Northern Securities case.*

It is not to be denied, however, that if for no other reason than the claim made by the Government as to its effect, the *Northern Securities case* and its circumstances and effect should be carefully considered: The Great Northern Railway Co. and the Northern Pacific Railroad Company were great railroad systems, each itself an instrumentality of interstate commerce, competing each with the other, and between them controlling the traffic, and the only means of transportation, in a vast extent of territory. A previous attempt to consolidate these companies had been defeated, as being in contravention of the statutes of the States of their incorporation (a). Under these circumstances the leading stockholders of each of these two railway companies, without any corporate action by the railway companies themselves, caused the formation of a company called the Northern Securities

(a) Pearsall *v.* Great Northern Railway Co., 161 U. S., 646.

Company, without any other than a nominal cash capital, without any tangible property in possession, or intended to be possessed, but as a simple holding company. This company, immediately after its organization by the principal stockholders of the two competing railway companies, offered, in accordance with a prearranged scheme, to acquire from the stockholders of the two competing railway companies their stock in consideration of its stock to be issued upon an agreed basis of exchange of its capital stock for the capital stock of the other companies. Suit was instituted by the Government promptly, but even before its institution the Northern Securities Company had become the holder of a majority of the capital stock of each of these competing railway companies, and thus able to elect the whole Board of Directors thereof and control the policy and operations of these two great instrumentalities of commerce. The Northern Securities Company had not in contemplation any further activity than the holding of these stocks, the collection of the dividends from them, the payment of dividends on its own stock, and the direct or indirect control of the affairs of the two railroad corporations. The controlling circumstances in this transaction are readily seen: The companies dealt with—public service companies—owed the public duty of continued existence and continued competition—private manufacturing companies owe no duty of continued existence, and their duty to compete can continue only so long as they continue an actual and independent existence. The formation of the Northern Securities Company could have no purpose or effect of increasing economy or efficiency or other such public advantages; its only practical utility was the elimination of the competition that had theretofore existed between the two roads, which elimination had been already determined to be against public policy.

There was a vigorous dissent in this court, even with all these facts, and the great question which divided the court was whether the Northern Securities Company was a *fact*, to be taken at its face value, or a *fiction* to be brushed aside in order to discover the real situation. A majority of this court held the latter view, and they looked and found, behind the fiction, a scheme between large stockholders of the competing roads to end competition between them through the instrumentality of this Northern Securities Company, and a majority of this court decided that this court could reach and nullify such scheme by treating the Northern Securities Company as the trustee of those stockholders.

This analysis of the facts of, and the decision in, the *Northern Securities case* is made with complete advertence to the case of *Harriman* v. *Northern Securities Co.* (a), in which Mr. Harriman, who had deposited stock of the Northern Pacific Railway Co. with the Northern Securities Co., sought, after the decision of this court, to recover the identical stock deposited by him on the contention that the original deposit, having been made contrary to law, was void. This court denied him relief, but not at the expense nor by the least abatement of its earlier opinion, rendered in the principal *Northern Securities case*. In the *Harriman case* the decision of this court was based squarely on the doctrine that the complainant was *in pari delicto* in the scheme for the restraint of trade effected by the organization of the Northern Securities Company and the deposit of stock with it, and, whatever the facts, was estopped by his conduct to deny—for his own affirmative relief—the title of that company to the stock deposited by him; that he must, therefore, submit to the equitable distribution in kind of its assets by the Northern Securities Company, according to the plan adopted by it after its in-

(a) 197 U. S., 244.

ability to enjoy such assets was established by the decree of this court.

The facts of this Northern Securities transaction are in contrast with the facts of the transactions found in the record of the case at bar. There is no holding company in the case at bar, but each defendant is engaged actively in the business for which it was incorporated, holding stock in other companies only as incidental to its main business, as permitted by the charter of the State of its incorporation, and as justified in each case by the exigencies of the business (a). None of the corporations whose activities in competition have been eliminated by mergers and purchases, as shown in the record of the case at bar, owed the public duty of continued existence, and hence they could not have owed the duty of continued activity, in competition or otherwise. No suggestion is made in the case at bar that these defendants have violated any state statute—their every act was expressly authorized by state statutes. This is in striking contrast with the fact in the *Northern Securities* case that a result was there accomplished violative of the statutes of the states where the railroads affected operated. If the elimination of competition had been the main purpose of the various consolidations and acquisitions that have occurred in the case at bar those acquisitions and consolidations would not on that account have been illegal, for men have the right to purchase in order to get rid of competition (*Cincinnati Packet Co.* v. *Bay, supra*); the elimination of competition, though, was not the purpose of the men who effected these consolidations and purchases, nor has it been the effect of such purchases and consolidations—brands of tobacco and products of tobacco compete with each other, though in the same hands—the purposes of the men active in the transactions shown in this case, and the effect of such transactions, have been

(a) *Ante*, pp. 21, 26, 53, 80.

to bring increased economy, efficiency and success to the business.

Continental Wall Paper Co. v. *Voight* (*supra*) is another case in which a corporation was used as an instrumentality for an unlawful combination among competitors, and it has the advantage over the *Northern Securities case,* so far as this litigation is concerned, of being a case involving commodities and not means of transportation. In the Wall Paper case it appeared that the producers of ninety-eight per cent. of the wall paper produced in the United States, together with certain Canadian manufacturers and manufacturers of wall paper machinery and many jobbers and wholesalers, entered into a combination to affect their sales and not their manufacture, and as a part of it formed a corporation the stock of which was owned by the manufacturers, nominally the manufacturers made all their sales to it and it resold to wholesalers and jobbers at a uniform price. Agreements were entered into between it and the manufacturers limiting the sales of the manufacturers, and the difference between the price at which the manufacturers turned over their goods to it and the price which it received constituted nominal dividends distributable among the manufacturers. The corporation was, under such circumstances, naturally held to be a mere fiction, the head of the illegal combination, and the whole arrangement was condemned. This sales agency arrangement, thus attempted to be used as an instrument to evade the law, is quite another thing from the consolidated or merged corporation, *bona fide* engaged in business as an industrial concern, such as the defendants in this case.

The great divergence of view among those who hold that the law forbids that elimination of competition which follows as an incident of legitimate

purchase or consolidation suggests that the view is erroneous. At least five different theories exist:

A. That notwithstanding the statute makes no distinction between large and small, important and unimportant, contracts and combinations in restraint of trade, purchases by, or consolidation among, competitors whose aggregate trade is small in volume (and this without respect to the second section of the Sherman Law which has to do with monopolizing, and which will be later considered), are innocuous and valid, while those affecting conduct of individuals or corporations whose trade is considerable in volume are void (a). This suggestion is made with respect to the construction of this criminal statute, which by its terms makes no such distinction, and when there is no suggestion of the measure to be applied by an individual in determining whether his contemplated conduct is lawful or unlawful.

B. That a "corporate combination" results from a plan to combine competing interests by forming a corporation and transferring to it various competing properties, but only where there is such an initial plan out of which the corporation is evolved (b). Under this, every corporation formed under the merger statutes of any of the States is at once illegal, because, of course, the consolidated corporation is formed as a part of the initial plan out of which it itself is evolved.

C. That such an illegal combination results from any corporate purchase where the purchase price is paid in the stock of the purchasing company instead of cash, or its equivalent (c). This is a more rigorous theory than the one just referred to and would

(a) This was suggested by the Government in the court below and will presumably be repeated in this court.

(b) Noyes (Circuit Judge), Intercorporate Relations, Sec. 319.

(c) Cir. J. Noyes' Opinion, Record, Vol. 1, p. 314.

not only nullify the merger statutes of most States, but would also open the door to flagrant evasions of the law, or would nullify the provisions of State statutes permitting the issuance of stock by a corporation in payment of property conveyed to it.

D. That such an illegal combination results from a corporate purchase of all or a part of the *capital stock* of another corporation, but not from a purchase of the *property* of such other corporation (a). This is substituting form for substance, and since it was only expressed by the lower court in the *Bigelow case,* and the lower court was reversed, it need not be further considered.

E. That such an illegal combination results from any purchase by a corporation of the business of a competitor, whether it be of stock or property, and whether the price is paid in cash, stock of the vendee corporation, or otherwise (b).

Of all these divergent views the logical though drastic one is the last—the one expressed by Circuit Judge Lacombe in the case at bar. If it be true that competition, once established, must be forever continued, then the competitor must not dispose of his business to a competitor—it is more a matter of form and legal casuistry than of substance whether the elimination of competition be by consolidation agreed upon in advance, or by sale for stock in the vendee company, or by a transfer of stock of the vendor corporation, which vendor corporation is kept separate at the option of the vendee for trade purposes, or by simply an ordinary sale for cash.

Such a construction makes the law not only revolutionary and drastic, but inconsistent with all the institutions of English-speaking people. It is not

(a) Bigelow *v.* Calumet Co., 155 Fed. R., 869, overruled in 167 Fed. R., 722.

(b) Cir. J. Lacombe's Opinion, Record, Vol. 1, p. 293.

to be forgotten that in denouncing as criminal the conduct of the vendee in purchasing a competing business, this law, as thus construed, so encroaches on as to virtually nullify the right to sell. If the most likely purchaser for a given factory cannot buy, the owner who desires to sell will get very little for his property, and when such owner desires to retire, or change his business or investment, he will find profitable retirement, or change of investment, impossible (a).

POINT III.

These defendants have not monopolized, nor attempted to monopolize, nor combined or conspired with any other person to monopolize, any part of the trade or commerce among the several states or with foreign nations.

The Petition of the Government in this case charges that the defendants have monopolized and attempted to monopolize a part of the trade and commerce among the several States of the United States and with foreign countries and so seeks to bring them under the condemnation of the second section of the Sherman Anti-Trust Law. The opinions of the court below in not condemning, in effect, if not expressly, acquit the defendants of this charge, and the matter of monopolizing is discussed only by Circuit Judge Noyes (b). In view, though, of the contentions of the Government, this brief should discuss the question.

The very first thing that suggests itself is that—

(a) For discussion of unconstitutionality of statute with such construction see *post*, p. 228.

(b) Record, Vol. 1, pp. 315-320.

POINT III—(Cont'd) Sub-Point I.

The typical transactions hereinbefore referred to, to wit: the consolidation of competing properties, or the purchase by the owner of one property of property theretofore used in competition with it (and no other transaction is shown by this Record), however often repeated, and even if they had been intended to bring within one ownership all of the plants at the time producing or distributing the particular commodity, were not transactions of, nor direct in their effect on, interstate or foreign commerce, and so do not constitute monopolizing nor attempting to monopolize interstate or foreign commerce within the second section of the Sherman Anti-Trust Law.

It has been said earlier in this brief that the transactions disclosed by this record fall as completely within the doctrine of the *Knight case* as the transactions of a case at bar will ever fall within the doctrine of a case decided. This is true not only as to the 1st section of the Sherman Anti-Trust Law but as to the 2nd as well. The *Knight case* was brought under the 2nd section as well as the 1st, and, as shown by the opinion of the Court, as well as by the Record of the case, the Government stressed the 2nd section—the monopoly alleged to have been formed—more than any other part of the Law. And why should it not have done so? The American Sugar Refining Company having sixty-five per cent. of the sugar

business, acquired the Philadelphia refineries, which, in the aggregate, produced about thirty-three per cent. of all the sugar of the United States. They were in active competition with each other and the American Sugar Refining Company selling their produce wherever demand was found for it throughout the United States. The object of the American Sugar Refining Company in purchasing these Philadelphia refineries was to "obtain a greater influence and more perfect control over the business of refining and selling sugar in this country," and by such purchase it became the owner of plants producing ninety-eight per cent., instead of sixty-five per cent., of all the sugar produced here.

Here existed all the elements of a monopoly as well as an intent to monopolize, so far as popularly understood, and in a necessity of life. *It was taken by the Court as a conceded fact that a monopoly, for the time being, was not only intended and attempted, but accomplished.* But it was direct in its effect only on property that had not begun to move; it affected the ownership of such property and not its transit, nor its sale in interstate commerce; it was indirect and incidental in its effect on interstate trade.

The *Knight case* is as unshaken in this as in all other respects. The argument of this brief heretofore made in Point II, Sub-Point I, ought not to be repeated, out of consideration for the time and patience of the Court. It is all applicable here, and establishes definitely the proposition that the only things condemned by any opinion of the Court below, the bringing into a common ownership of many theretofore competing plants, is not within the condemnation of the Sherman Law—whether the 1st or 2d section—or, indeed, the jurisdiction of Congress—not within the scope of Federal authority.

POINT III—(Cont'd) Sub-Point II.

The transactions disclosed by this Record do not constitute monopolizing trade, whether such trade be interstate or otherwise, and without reference to the limitations of the scope of Federal authority declared and enforced in the Knight case.

No case has been decided in which a person or corporation has been condemned for violating the second section of the Sherman Law, which forbids monopolizing, in which there was not also involved an adjudged violation of the first section, which forbids contracts, combinations and conspiracies in restraint of trade. Courts have said, indeed, that the second section of the Sherman Law was passed in aid of the first, and have intimated that without violation of the first it was hard to conceive a violation of the second (a). The term "monopoly" has been in popular phraseology the husband, or wife, of the term "trust," so that the words "trusts" and "monopolies" have usually gone hand in hand through newspapers and magazines; they have even walked thus together through some opinions of courts, without any clear distinction as to where in the given case the "trust," supposed to exist in violation of the first section of the Sherman Anti-Trust Law began, and the "monopoly" supposed to exist in violation of the second section of the Sherman Anti-Trust Law ended.

Congress did not mean by the second section of the Sherman Anti-Trust Law to limit the acquisition of property by citizens of States and corporations formed under State authority. The

(a) Northern Securities Case, 193 U. S., 197.
Whitwell *v.* Continental Tobacco Co., 125 Fed., 462.

language used is that there must be no monopolizing of "trade," not that there must be no monopolizing of commodities or plants.

> "Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted (a).
>
> "It is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiff, would in the present day, be impossible—would be only another method of attempting to set boundaries to the tides." (b)
>
> "Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite, one inducement being to stop the sharp competition then existing between them. But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country, and to formation of new companies. This is neither monopoly nor such an approach to it as amounts to the same thing. It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition." (c)

(a) United States *v.* E. C. Knight Co., 156 U. S., 1, 16.

(b) Mogul Co. *v.* McGregor, L. R., 23 Q. B., 598, 618.

(c) Oakdale *v.* Garst, 18 R. I., 484; 49 Am. St. Rep., 784.

"It is not very clear what Congress meant by the second section of the act of July 2, 1890, in declaring it a misdemeanor to 'monopolize' or 'attempt to monopolize' any part of the trade or commerce among the states or with foreign nations. It is very certain that congress could not, and did not, by this enactment attempt to prescribe limits to the acquisition either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities, just in proportion as the owners business is increased, enlarged and developed. But the magnitude of a party's business, production, or manufacture with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns." (a)

A recent statement of what does and what does not constitute an attempt to monopolize was given by Ex-Judge Taft, now President of the United States, in a speech delivered at Columbus, Ohio, August 19, 1907. This is quoted, not on account of

(a) *In re Greene*, 52 Fed., 115.

the present prominence of President Taft in public affairs, but because he is a great lawyer, was a great judge, and has given earnest consideration to this statute, as evidenced by his opinion in the *Addyston Pipe and Foundry case.*

> "I conceive that it ('monopoly' under the Sherman Law) is not sufficiently defined by saying that it is the combination of a large part of the plants in the country engaged in the manufacture of a particular product in one corporation. There must be something more than the mere union of capital and plants before the law is violated. There must be some use by the company of the comparatively great size of its capital and plant and extent of its output, either to coerce persons to buy of it, rather than of a competitor, or to coerce those who would compete with it to give up their business. There must in other words be an element of duress in the conduct of its business towards the customers in the trade and its competitors before a mere aggregation of plants becomes an unlawful monopoly."

It is undoubtedly true that the word "monopolize" as used in the Sherman Anti-Trust Law has a different meaning from that word, or its counterpart word "monopoly," as used at common law or in English statutes. But one may well look to the common law for a definition that throws light on the meaning that the word "monopolize" was intended by Congress to have. At common law a "monopoly" was

> "a license or privilege, allowed by the King for the sole buying and selling, making, working or using of anything whatsoever *whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before*" (a).

"Monopoly" and "Monopolize" are words which still carry with them the idea of exclusion or re-

(a) 4th Blackstone, p. 159.

straint. Whatever the magnitude of the single concern may be and whatever the volume of business there may be to-day in its hands, it is not guilty of the crime of monopolizing, or attempting to monopolize unless it is doing something by which there is either attained or attempted this result, to wit: that the *"subject in general* (the person not connected with the single concern) *is restrained from that liberty of manufacturing or trading which he had before."*

This idea carried into the construction of the second section of the Sherman Anti-Trust Law renders it understandable and a fitting supplement to the first section. The first section forbids conspiracies in restraint of trade—conspiracies as defined by Mr. Justice Holmes in the *Northern Securities case* (*supra*) which have for their purpose the exclusion of strangers to the conspiracy from interstate trade. Conspiracy, by the very force of the word, involves the concurrent action of *two* or more. The second section supplements this first section, and provides in effect that the individual or corporation may not singly or in combination and conspiracy with others, attempt to monopolize interstate trade or commerce; that is, may not attempt to exclude or restrain others from that liberty of interstate trading which those others had before.

This construction which makes the exclusion of others from the trade the gist of monopolizing or attempting to monopolize has the additional advantage over any other construction that it makes the whole of the second section of the Act effective. The second section condemns as criminal not only every person who monopolizes or attempts to monopolize trade or commerce among the several States or with foreign nations, but every person who monopolizes or attempts to monopolize *"any part"* of such trade and commerce. If monopolization occurs, or if an attempt to monopolize is to be

inferred, from a mere unification of ownership of plants engaged in the production of a commodity, to what extent must such unification proceed before the offending party may be said to have monopolized *"any part"* of trade and commerce? No satisfactory meaning can be given to the words *"any part"* under such construction. If securing for oneself a considerable volume of trade in a given commodity is to be condemned as monopolizing or attempting to monopolize the trade in such commodity, how much must one's volume of trade be before he is guilty of the crime? What is to be the minimum below which there is no guilt, and the maximum beyond which there is no assurance of innocence? Considering that the statute uses the words *"any part,"* no one can with any degree of satisfaction answer the question with such a construction. But when the word "monopolize" is given its meaning inherited from the common law, to-wit: the restraint of others from liberty of trading, the use of the phrase *"any part"* becomes natural and reasonable; it is an offense to restrain or exclude others from *"any part"* of trade or commerce. That it is the duty of a court to give that construction to a statute, and to each section of a statute that gives meaning and effect to every word in it, if possible, is elementary learning. It is respectfully submitted that the construction now contended for gives to all the phrases of the second section of the Sherman Anti-Trust Law reasonable meaning and effect, and that no other construction does.

> "I repeat, that in my opinion there is no attempt to monopolize and what as I have said in my judgment amounts to the same thing that there is no combination in restraint of trade until something is done with the intent to exclude strangers to the com-

bination from competing with it in some particular business which it carries on" (a).

"It will be noticed that in all the foregoing definitions of 'monopoly' there is embraced two leading elements, viz.: an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an attempt to monopolize any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein" (b)

"Monopoly implies an exclusive right from which all others are debarred and to which they are subservient" (c)

It would seem to these defendants that there cannot be a monopolizing of the trade in a given commodity, except in one of the four following ways, to wit:

1st. By preventing others from getting their fair requirement of the raw material for the manufacture of commodities;

2nd. By preventing others from obtaining their fair requirements of machinery or other facilities needed to produce the given commodity;

3rd. By preventing others from the use of transportation facilities for the distribution of their manufactured product;

4th. By preventing others from using the machinery of distribution—in the tobacco business, jobbers and retailers.

(a) Justice Holmes in Northern Securities case, 193 U. S., 409.

(b) *In re* Greene, 52 Fed., 116.

(c) Chemical Co. *v.* Providence Co., 64 Fed., 946, 949.

It is not intended to concede that if any of these four results come incidentally in the conduct of one's own business there is any infraction of the Sherman Law. For instance, a manufacturer may, if his needs require, buy all of the raw material available, although there incidentally results that his competitors are unable to procure their requirements; the discoverer, or inventor of a secret process or improved machinery for manufacture is under no duty to disclose his secret process or refrain from patenting his machine, although his failure to do so results in his competitors being unable to economically and efficiently manufacture the product; a manufacturer has the right to offer inducements to a given wholesaler or retailer to handle his products exclusively—this is simply competition, and his competitor can do the same with other merchants in existence, or with other merchants induced to come into existence (a). In this Record, though, there is not only no evidence to show that any of these means of monopolizing have been used by the defendant, but there is abundant evidence they have not used any of these means to exclude any competitor from the trade.

1. It is plain that they do not exclude their competitors from the acquisition of their respective requirements of the raw material. The principal raw material of the tobacco business is leaf tobacco, and these defendants own no tobacco lands in the United States; there are unlimited lands now devoted to other crops upon which tobacco leaf may be grown; they use less than half the annual crop of this country; every pound they buy, they buy in competition with others; they realize that there is always an available supply on the market for a single year's production and that with unlimited lands not in their control for its production, an attempt to corner the market by exorbitantly high

(a) Whitwell *v.* Continental Tobacco Co., *supra.*

prices would be followed by tremendous crops and lower prices. No suggestion is made in the proof of any attempt thus to corner the supply of tobacco, unless the advance in 1904 in the price of cigar "cuttings" is to be so dignified. The facts with respect to this have been heretofore fully discussed (a) and ought not to be repeated; it may not be improper to state here briefly that there is absolutely no proof that the advance was not because of crop conditions or that any manufacturer was injured by the transaction in question—on the other hand two manufacturers of the only type of tobacco affected, testified to the absence of any injury, and it appears that the rise in price was expected by scrap manufacturers as a natural outcome of crop conditions.

2. These defendants do not control or exclude others from transportation facilities for bringing the raw material to the place of manufacture or carrying the manufactured product to market. There is not a particle of evidence which even tends to the suspicion that any of these defendants ever possessed an advantage of this character over any of their competitors; or that any of them ever received directly or indirectly a rebate from a railroad or other transportation company. Indeed, the Government makes no such contention. This is a matter of great importance, for it is generally charged and relied upon in Government prosecutions under this law that many of the large industrial companies in the United States have flourished by reason of this advantage; "it is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation" (b). The growth and prosperity of these defendants cannot be attributed in any way to the

(a) *Ante*, p. 101.

(b) Swift *v.* U. S., 196 U. S., 401.

practice of receiving rebates or other concessions from transportation companies.

3. These defendants have no control over the processes of manufacture, nor does the Government make such claim. The several concerns which were purchased by The American Tobacco Company in 1890 made cigarettes by machinery, an innovation in manufacture which was introduced in the early eighties. It does not appear, however, that they controlled the patents on those inventions or that anyone might not have procured a license to manufacture by this new method if he desired. For many years cigarette machines have been procurable by any one, and have been in general use. American Cigar Company owns a machine for making cigars, but it has never been successful. Success in the manufacture of any kind of tobacco or its products does not depend upon the machines which some possess and others do not—the machinery is usually obtainable. The process for the manufacture of a given brand is secret, but there is nothing in the nature of the business which prevents anyone who has the requisite skill and enterprise from doing to-morrow what his competitor has done to-day.

4. These defendants have no control over the facilities of distribution—there are sufficient jobbers and retailers willing and anxious to distribute the goods of competing manufacturers to furnish them all the facilities they require. There are over 600,000 retailers in the United States selling tobacco and its products; The American Tobacco Company, by ownership of a majority of the stock, controls the United Cigar Stores Company, which has 409; it has no control at all over the other 599,591. Out of the 5,000 jobbers distributing tobacco it owns one, and American Cigar Company owns six.

That the avenues of distribution are open and free to all, and that any one engaged in the manufacture of tobacco or its products or desiring to engage in such business can obtain jobbers and retailers through whom to market his goods is established by such overwhelming evidence that no room is left for doubt. The drummers of independent manufacturers called by the Government testified that the channels of distribution are open to all and that their houses have no difficulty in marketing their goods (a). The independent tobacco and cigarette manufacturers called by the defendants said the same thing (b). Tobacco jobbers from Seattle, Omaha, Chicago, Detroit, Toledo, Rochester, Utica, Baltimore, Savannah, Hartford and Bangor, who, taken together, sell through all sections of the United States, and whose united business exceeds $50,000,000 per annum, give the same testimony (c); and the officers of defendant companies are but in agreement with all these unprejudiced witnesses, or witnesses prejudiced against the defendants, when they state and show the facts to be as here indicated (d).

To break the force of this the Government would leave the impression that because out of 4993 jobbers engaged in selling tobacco throughout the United States, and not owned, or controlled directly by the defendants, 253 receive special allowances or inside commissions from some of the defendants, such jobbers are therefore under some sort of compulsion to discriminate in favor of its product. In the first place it may be said that if these 253 jobbers who receive special allowances were under such compulsion there would be nothing illegal in it (e); there would still be 4740 tobacco jobbers

(a) *Ante*, p. 131.
(b) *Ante*, p. 134.
(c) *Ante*, pp. 131-3.
(d) Ante, p. 135.
(e) Whitwell *v.* Continental Tobacco Co., *supra*.

through whom competing manufacturers might secure distribution. The fact is, though, that every tobacco jobber who was examined testified that he had no agreement, express or implied, to handle the goods of defendants to the exclusion of others; that his special allowance or inside commission was for extra work done, especially in distributing new brands; *that he received like commission from other tobacco manufacturers;* that the payment of such commissions had been the custom in the tobacco trade and other branches of the wholesale grocery business for many years and was not introduced by any of these defendants.

Having thus shown that the defendants have pursued none of the ways that may be imagined to exclude others from the tobacco trade, it would be surprising if there appeared in the Record that there had resulted such exclusion without the use of any of these means. The Record does not show any such surprising result, but shows on the other hand beyond all question that there has been no exclusion; that other manufacturers of tobacco and its products have prospered unembarrassed by the activities of these defendants in securing their raw material, in operating their processes of manufacture, in securing transportation for their raw material and manufactured product, and in having their manufactured product distributed through the ordinary avenues of the tobacco trade. Although in repetition of what has been already said in the discussion of facts, it may here be briefly stated that it was the defendants and not the Government that called as witnesses the two largest manufacturers of tobacco in their respective lines, Black and Peper, and the largest manufacturer of cigarettes, Schinasi—all three absolutely independent of all of the defendants and with no relation with any of the defendants, except the relation of

competitor, and they testified clearly and distinctly as to their success and the fact that their business activities had not been embarrassed by the competing activities of the defendant tobacco and cigarette manufacturers. The drummers for other tobacco and snuff manufacturers called by the Government were unwilling, but all the more impressive, witnesses to the fact that their employers were thriving in business, unembarrassed in their activities by the activities of the defendants.

It has been urged, however, that the two tobacco manufacturers who testified for the defendants were the owners of old established businesses, and that while the activities of the defendants had not put them out of business, it is quite impossible for a new tobacco manufacturing enterprise to be put into successful operation. That this suggestion is without merit is shown by the fact that one of the Government's witnesses was a drummer for the United States Tobacco Company, a concern started in 1899 with the funds that its promoters had secured upon the sale of a former business to Continental Tobacco Company. If the case of Scotten Dillon Tobacco Company of Detroit, Michigan, stood alone it would refute absolutely the contention of the Government that other manufacturers are in any way excluded from trade in tobacco and its products: Scotten Dillon Tobacco Company was started in Detroit in 1902 upon funds that its promoters received three years before upon the sale of a previously owned business to Continental Tobacco Company. It went into active competition with defendants, engaged in the manufacture of tobacco and it has built up a business of from 10,000,000 to 12,000,000 pounds per year, declaring regular and large dividends all the time. The story of the two Armenian brothers—Schinasi Brothers—as told by them on the stand, and the tremendous

success of their cigarette business, built up in competition with the defendants, is impressive in the same way.

In the court below, Judge Noyes, who is the only judge who discusses the matter of monopoly, while not deciding that the defendants have monopolized trade, argues that a monopoly exists when there exists the power to control the prices of commodities, and that, in view of the fact that the defendants purchase more than half of certain types of tobacco they have the power to fix the prices to be paid for such crops, and that because the defendants manufacture more than half of certain types of tobacco or its products they may fix the price which the consumer pays for such products. It is unquestionably true that wealth gives power, but it is respectfully submitted that the possession of such power as wealth always gives cannot be used to exclude the wealthy individual or corporation from a given line of business. If so, a moderately wealthy man could not engage in a business the aggregate volume of which was small, and the very wealthy could not engage in any business at all. If the defendants refrained from competing on a particular crop of tobacco of which they are normally large purchasers the price would fall, but the same thing is true to a less extent of the same action on the part of the small purchaser of a given type. If the defendants see fit to advance the price of their manufactured product consumers will for a while pay such advanced price until they are driven to a competing brand. The existence of this power, though, is incident in a greater or less degree to all business, and it is a power which if exercised contrary to the ordinary laws of supply and demand will bring upon him who exercises it the greatest punishment.

No apology need be made for again calling to the attention of the Court the *Knight case,* which re-

curs so frequently as an authority on every aspect of this case. The American Sugar Refining Company became, by its purchase of the Philadelphia refineries, more powerful in the sugar trade than these defendants have become in the tobacco trade. The *Knight case* was brought under the second section of the Sherman Anti-Trust Law as well as the first, and this Court was not induced by any consideration of the power that was thus given it to nullify the purchase by the American Sugar Refining Company of the Philadelphia refineries.

> "The magnitude of the party's business, production or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns" (a).

POINT III continued—Sub-Point III.

The defendants have not only not monopolized, but they have not attempted to monopolize any part of interstate or foreign trade and commerce.

In so far as an attempt, or intent, to monopolize interstate and foreign trade might be inferred from the often repeated purchase of manufacturing plants, it is sufficient to say that such purchases, even with such intent admitted, do not bring such transactions within the scope of Federal legislation. This is the necessary conse-

(a) *In re* Greene, 52 Fed., 104, 115.

quence of the argument already made and, perhaps too often, already repeated.

Such purchases, though, have not had such intent. The defendants have at their command large capital; their officers know the tobacco business in all its ramifications; they have had a natural and laudable ambition to enlarge constantly their business activities; their investments have naturally been in additional tobacco manufacturing establishments. But the record contains nothing to contradict the testimony of the principal officers of The American Tobacco Company that no purchase has been made except with the distinct expectation—very rarely disappointed—that the particular property purchased, without reference to its effect on other property—by diminishing competition or otherwise—would be distinctly profitable (a). Factory buildings have been closed, it is true, but only that the goods might be more economically or efficiently manufactured elsewhere, and thus achieve the real economic benefit of real consolidation (b). No factory was bought to be stopped; no interest in a competitor has been acquired, stealthily or otherwise, to stop the activities of such competitor.

No case could be imagined which, better than the case at bar, typifies the evolution of a great business, built up with foresight it is true, but principally by efficiently doing each day its work. It is impossible to read the testimony of the President of The American Tobacco Company and conceive that in 1890 he and his associates planned and plotted to obtain a monopoly, legally or otherwise, of the tobacco business of the country. Sometimes, for long periods there were no purchases; offers were made to sell and dispose of lines or

(a) *Ante*, pp. 82-3.
(b) *Ante*, pp. 54-5.

branches of the business (a), investments have been made, and the management of those investments left entirely in other hands (b).

An examination of the business methods and practices of these defendants, as disclosed by the record, shows the existence of no design to create a monopoly. It is not intended to argue that defendants have not sought by their course of business to enlarge their business, and it is not intended to argue that they have been deterred in their efforts to enlarge their business by the knowledge of the fact that an enlargement of their business meant to some extent a diminution of the business of other tobacco manufacturers. It is intended to argue, though, that defendants have not attempted to exclude others from the trade; that they have not adopted measures having for their primary purpose the diminution of the trade of another with only the secondary or ulterior purpose of increasing their own trade; but have pursued the ordinary course of competition, using methods that had for their direct and primary purpose increasing their own trade and only as a consequence the diminution of the trade of their competitors.

(1) They have not sought to prevent their competitors securing leaf tobacco—there is not a line of testimony in the record that shows the purchase of a pound of leaf tobacco for any other purpose than to supply the legitimate requirements of defendant.

(2) The supply companies owned by defendants, supplying the peculiar requirements of tobacco manufacturers, such as licorice paste, wooden boxes, tinfoil and cloth bags, sell to competing tobacco manufacturers on substantially the same basis as to the defendant tobacco manufacturers themselves (c).

(a) *Ante*, p. 16.
(b) *Ante*, pp. 80-8.
(c) *Ante*, pp. 34, 36, 37, 40.

(3) The stores owned by defendant tobacco manufacturers sell products of competing manufacturers (a); these stores ought, considering who their real owners are, to give preference to the products of the defendant manufacturers, but it is by no means clear from this record that they always do so, and they certainly handle to such extent as their customers require goods manufactured by others.

(4) The jobbers who receive special allowances, or an inside commission, from the defendant tobacco manufacturers handle the goods of competing manufacturers (b).

(5) The only two occasions when the company adopted (locally in New England and Philadelphia) trade plans by which defendants' customers were not at liberty to buy competing goods, were occasions when such plans were adopted at the instance of the customers themselves and were abandoned as poor business policy, long before the institution of this suit (c).

(6) The defendant The American Tobacco Company, or its predecessor Continental Tobacco Company, sold a tobacco manufacturing plant to Scotten Dillon & Company, with the knowledge that it was to be used as a competing factory (d).

(7) No effort has ever been made to purchase the large manufacturing establishments of Bloch Brothers, Peper and Schinasi—three of the large, successful and aggressive competitors of defendants (e).

(a) *Ante*, p. 138.
(b) *Ante*, pp. 131-3.
(c) *Ante*, p. 128.
(d) *Ante*, p. 145.
(e) *Ante*, p. 134.

(8) A large number of the large customers of the defendant The American Tobacco Company, do not deal in the cigars of American Cigar Company, although they know, and have known of the interest of The American Tobacco Company in American Cigar Company. This applies to customers of The American Tobacco Company who receive the special inside commission. This certainly demonstrates either the lack of power, or lack of intent to monopolize (a).

(9) The defendants have never taken from their employees, to whom they have imparted their secrets of manufacture, covenants not to engage in the tobacco business on their own account or not to enter the employ of others.

(10) The defendants have never sought advantage over their competitors in transportation facilities or charges, notwithstanding the tremendous volume of their transportation business.

(11) While the defendants have at present a large proportion of certain lines of the tobacco business, there is no line in which there does not exist competition; no brand of the defendants but has competing brands owned by those not related to defendants; and any merchant selling tobacco, or consumer using tobacco, can readily supply his requirements without patronizing any of the defendants (b). There has been an absolute diminution, notwithstanding repeated purchases, in the aggregate percentage of business of the defendants in some lines (notably the cigarette business of which in 1890 The American Tobacco Co. had 97%, whereas in 1907 it and all the other defendants had in the aggregate less than 74%) (c), and if the tobacco business, including cigars, be taken as a

(a) *Ante*, p. 132.
(b) *Ante*, p. 136.
(c) Rec., Vol. V, Ex. 77.

whole, the defendants have not an aggregate of so much as forty per cent. thereof (a).

The operation of secretly owned companies was an effort to obtain business for the defendants—it was a method of competition the dignity and ethical propriety of which may be questioned—but in questioning it consideration should be given to the circumstances of the venomous, unscrupulous competition that caused it (b)—but without reference to the propriety of this method of competition it was not an effort to exclude others from the trade except in the secondary and incidental way in which all competition is an effort to exclude the competitor.

There are those who believe that Congress intended in the second section of the Sherman Anti-Trust Law to prevent overzealous competition, such as the rich and powerful may use to the injury of the weak and struggling. It may be that it would be wise by a definite statute to protect the weak and struggling competitor, and it may even be that Congress had this in mind in adopting the second section of the Sherman Anti-Trust Law. It can be only a guess, though, whether Congress intended this or not, and, if it did so intend, what particular methods of competition it purposed to prevent. Did it, for instance, or did it not intend to prevent the sale of goods below cost? No law, and especially no criminal law, should be given an effect not plainly intended by Congress. Laws which punish—whether by regular criminal proceedings or otherwise—should be so definite and explicit as to advise citizens what they may and may not do (c). Admitting for the mo-

(a) *Ante*, p. 40.
(b) *Ante*, pp. 116-121.
(c) Railroad *v.* Dey, 35 Fed., 866;
U. S. *v.* Brewer, 139 U. S., 278;
Railroad *v.* Railroad Com., 19 Fed., 679.

ment that it was the purpose of Congress in enacting the second section of the Sherman Anti-Trust Law to protect the weak and struggling against the competitive methods of strong and powerful competitors, and that it is in accordance with our institutions for Congress to delegate to the courts the duty of ascertaining and declaring what particular methods are to be thus condemned—with all this admitted, the record in this case is singularly free from evidence of the use of such methods by these defendants. Consider the facilities which the Government had for a minute and sinister examination into all the affairs and operations of these defendants during an active business life of substantially twenty years; and then consider how few the instances, if any, in which goods have been sold below cost in a given community with the purpose to crush a weaker competitor—how few the instances where there has been the slightest abuse of their power by these defendants—if such power exists. The methods of trade open to criticism, on even the ground of lack of dignity or ethical propriety, have not constituted the basis, nor any part thereof, of the success and achievement of the defendants.

It is in recognition of all this that Circuit Judge Lacombe finds an absence of evidence that the defendants by unfair competition or improper practices have dragooned independent manufacturers to sell out to them (a); and that Circuit Judge Noyes says that the elements of oppression and coercion that are perhaps necessary to establish a monopoly are certainly not sufficiently presented on this record (b), and that Circuit Judge Ward in his dissenting opinion says that he is satisfied that these defendants'

> "purpose and conduct were not illegal, but that they strove, as every business man

(a) Record, Vol. 1, p. 292.
(b) Record, Vol. 1, p. 320.

> strives, to increase their business and that their great success is the natural growth resulting from industry, intelligence and economy, doubtless largely helped by the volume of business done and great capital at command" (a).

It is argued seriously though that there has existed a purpose of monopoly on the part of the "conspirators" who formed The American Tobacco Company in 1890, and have since conducted its affairs; that their every step has had, that purpose; and that so successful have these steps and this conspiracy been that to-day eight men, to wit: J. B. Duke, O. H. Payne, A. N. Brady, Thomas F. Ryan, P. A. B. Widener, B. N. Duke, Estate of W. L. Elkins, and Estate of W. C. Whitney, are in control of its affairs; and that the fact that these eight men are thus in control is not only the fruit, but the proof, of the conspiracy. Undoubtedly eight men in the aggregate hold a majority of the voting stock of The American Tobacco Company; undoubtedly also an examination of the books of any corporation, large or small, would show that a comparatively small number of individuals own in the aggregate a majority of its stock (under the law of most States three men may not only control, but own all the stock of a corporation); there is nothing in the Record in this case to indicate that these eight men are bound together any more closely than any other stockholders. A significant fact does appear though: If the organizers of The American Tobacco Company in 1890 were plotting to secure a monopoly of the tobacco business they plotted to ignominous failure, for of the eight men who, if they act together, can now control the affairs of this large and prosperous corporation, only two were of its original organizers; the other six have come into it and its affairs long

(a) Record, Vol. 1, p. 328.

afterwards, and from time to time as they have seen fit to invest in its stock. Another significant thing appears: Of these eight men said to be in control of the affairs of this great business, whose individual power and wealth are thus a menace to the public, two are already dead—with executors, and creditors, and next of kin to take their respective places. The significance of this should not be lost on those who seek to correct and prevent all sorts of real and imaginary ills by piling statute upon statute. Just as many theoretical dangers of industrial life are eliminated by the inevitable laws of supply and demand and the other laws of trade, so tendencies to the too great individual accumulation of power and wealth are effectually prevented—not by statutes of legislatures or decrees of courts, but by the inexorable laws of nature.

POINT III continued—Sub-Point IV.

Since the Sherman Law was enacted to foster competition, the attained or attempted exclusion of others from trade that is the necessary element in monopolizing, or attempting to monopolize, must be by methods not allowed in competition at common law.

We have attempted to show that monopolizing, or attempting to monopolize, does not consist in any degree in mere ownership or acquisition, but consists in a course of conduct, otherwise evidenced, adopted and pursued with the purpose of excluding others from competing in the particular line of business. Immediately the question arises, what is such a course of business? The defendants

confidently argue that one is not guilty of monopolizing, or attempting to monopolize, trade and commerce under this Act, unless he excludes another from all or "any part" of interstate trade by an act or conduct violative of the rights of that other at common law; his act or conduct must be such as would, if the transaction were not within the jurisdiction of Federal courts, whose authority to enforce the common law is at least questionable, lay him liable to either an indictment or an action for damages. Any other construction gives the law an indefiniteness and uncertainty that is intolerable, besides completely nullifying the great object of this law, to-wit: to promote the free play of competition in interstate trade and commerce (a).

> "Competition, it is often said, is the life of trade. But the object of all competition is to drive out other competitors." (b)
>
> "To say that a man is to trade freely but that he is to stop short at any act which is calculated to harm other tradesmen and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection." (c)

The rights of competitors are and have always been different from the rights of strangers to the trade. The hat makers in *Loewe* v. *Lawlor* (*supra*) sought to break down the business of the plaintiffs in that action, and their conduct would have given plaintiffs a cause of action at common law; if the defendants in that case had sought to sell hats of their own manufacture and so displace the business of plaintiffs, the injury to plaintiffs might have been exactly the same, but it would have been *damnum absque injuria*, because the con-

(a) Whitwell *v.* Continental Tobacco Co., 125 Fed., 462; Phillips *v.* Iola Cement Co., 125 Fed., 593; 192 U. S., 606.

(b) Bonsack Machine Co. *v.* Smith, 70 Fed., 383, 388.

(c) Bowen, L. J., in Mogul Co. *v.* McGregor, 23 Q. B. D. 598.

duct of defendants would have been an act of competition such as the law approves.

> "The only argument that we have heard in support of interference by labor unions in cases of this kind is that it is justifiable as a kind of competition. It is true that fair competition in business brings persons into rivalry, and often justifies action for one's self which interferes with proper action of another. Such action on both sides is the exercise by competing persons of equal conflicting rights. The principle appealed to would justify a member of the union, who was seeking employment for himself, in making an offer to serve on such terms as would result, and as he knew would result, in the discharge of the plaintiff by his employer, to make a place for the new comer. Such an offer, for such a purpose, would be unobjectionable. It would be merely the exercise of a personal right, equal in importance to the plaintiff's right. But an interference by a combination of persons to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some matter in which he has a right to act independently, is not competition. In such a case the action taken by the combination is not in the regular course of their business as employees, either in the service in which they are engaged, or in an effort to obtain employment in other service. The result which they seek to obtain cannot come directly from anything that they do within the regular line of their business as workers competing in the labor market. It can come only from action outside of the province of workingmen, intended directly to injure another, for the purpose of compelling him to submit to their dictation. It is difficult to see how the object to be gained can come within the field of fair competition." (a)

(a) Berry *v.* Donovan, 188 Mass., 353.
See also Barnes *v.* Typographical Union, 232 Ill., 424; Barr *v.* Essex Trades Council, 53 N. J. Eq., 101, 124.

> "Competition in trade, business, or occupation, though resulting in loss, will not be restricted or discouraged, whether concerning property or personal service. Lawful competition that may injure the business of another even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing the result, be actionable unless there was actual malice." (a)

Undoubtedly the great mine of learning on the rights of competitors at common law is the case of *Mogul S. S. Co.* v. *MacGregor* (b). Whatever may be said as to the inapplicability of this great case in so far as it establishes the right of natural competitors to take action in combination, no court has held its doctrines unsound in so far as they declare the common law rights of competitors. Lord Halsbury said:

> "I entirely adopt and make my own what was said by Lord Justice Bowen in the court below: 'All commercial men with capital are acquainted with the ordinary expedient of sowing one year of apparently unfruitful prices in order by driving competition away to reap a fuller harvest of profit in the future;' and until the present argument at the Bar it may be doubted whether shopowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that Law Courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go and no further.'"

(a) Doremus *v.* Hennessey, 176 Ill., 608.

(b) 23 Q. B. D., 598; App. Cases (1892), p. 25.

Lord Field said:

> "I think this appeal may be decided upon the principles laid down by Holt, *C. J.*, as far back as the case of *Keeble* v. *Hickeringill,* cited by the appellants (11 Mod., 73, 131, and note to *Carrington* v. *Taylor,* 11 East, 574). In that case the plaintiff complained of the disturbance of his 'decoy' by the defendant having discharged guns near to it and so driven away the wild-fowl with the intention and effect of the consequent injury to his trade. Upon the trial a verdict passed for the plaintiff, but in arrest of judgment it was alleged that the declaration did not disclose any cause of action. Holt, *C. J.*, however, held that the action, although new in substance, was not new in reason or principle, and will lay, for he said that the use of a 'decoy' was a lawful trade, and that he who hinders another in his trade or livelihood is liable to an action if the injury is caused by 'a violent or malicious act;' suppose 'for instance,' he said, 'that the defendant had shot in his own ground, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong.' But, he added, if the defendant, 'using the same employment as the plaintiff, had set up another decoy so near as to spoil the plaintiff's custom, no action would lie because the defendant had 'as much liberty to make and use a decoy' as the plaintiff."

Other cases involving a similar declaration of the rights of competitors to undersell competitors (a), to have secret partners (b), to adopt a policy

(a) Com. *v.* Hunt, 4 Metc., 111, 134; National Ass'n *v.* Cumming, 170 N. Y., 315, 330; Lough *v.* Outerbridge, 143 N. Y., 271, 283; Tuttle *v.* Buck (Minn.) 119 N. W., 946.

(b) 1 Lindley on Part (2nd Am. Ed.) star p. 16; Mecham's Elements of Part., Sec. 15; Winship *v.* Bank of U. S., 5 Pet., 529, 562; Brooks *v.* Washington, 8 Gratt (Va.), 248.

of business that can only result in destruction of weaker competitors, even though as a part of it there is a sale of goods below cost (a), or provision for exclusive handling (b), are cited in the foot notes. It is equally true that purchases of competing businesses were not unlawful at common law, even though such purchases were made to get rid of ruinous competition (c), nor are they under this Act (d).

> "The plaintiff had a perfect right to buy off the competition of a powerful, dangerous and aggressive rival. The law of self-defense and protection applies to one's business as well as to his person." (e)

(a) Aikens *v.* Wisconsin, 195 U. S., 194, 203; Jaster *v.* Currie, 198 U. S., 144, 148; National Co. *v.* Mason's Ass'n, 169 Fed., 259, 265; Citizen's Co. *v.* Montgomery Co., 171 Fed., 553, 559; Vegelahn *v.* Gunther, 167 Mass., 92; Martel *v.* White, 185 Mass., 255; Lewis *v.* Lumber Co., 121 La., 658; Karges Co. *v.* Amalgamated Union, 165 Ind., 421.

(b) Palmer *v.* Stebbins, 3 Pick. (Mass.), 188, 192; Chicago Co. *v.* Pullman Co., 139 U. S., 79, 80; Brown *v.* Rounsavell, 78 Ill., 589; Walsh *v.* Dwight, 40 N. Y. App. Div., 513; Houck *v.* Wright, 77 Miss., 476; Walter Wood Co. *v.* Greenwood Co., 75 S. C., 378; Ferris *v.* American Co., 155 Ind., 539; *Re* Greene, 52 Fed., 104, 117; Dueber Co. *v.* Howard Co., 66 Fed., 637, 664; Whitwell *v.* Continental Tobacco Co., 125 Fed., 454, 460.

(c) United Shoe Co. *v.* Kimball, 193 Mass., 351; Wood *v.* Whitehead Bros. Co., 165 N. Y., 545, 551; Lanyon *v.* Garden City Sand Co., 223 Ill., 616; National Co. *v.* Cream City Co., 86 Wis., 352.

(d) Cincinnati Co. *v.* Bay, 200 U. S., 179; Brett *v.* Ebel, 29 N. Y. App. Div., 256, 259; Bancroft *v.* Embossing Co., 72 N. H., 402.

(e) U. S. Chemical Co. *v.* Provident Co., 64 Fed., 946, 950.

POINT III continued—Sub-Point V.

The second section of the Sherman Anti-Trust Law forbidding monopolizing or attempting to monopolize, can never justify an injunction against a state of being, but only against threatened activities—such activities or conduct as are not threatened in the case at bar.

The title of the Sherman Anti-Trust Law is "An Act to protect trade and commerce against unlawful restraints and monopolies." The statute itself does not contain the word "monopoly" or "monopolies," but only forbids monopolizing, attempting to monopolize, or combining or conspiring with any other person or persons to monopolize. There are five kinds of remedies provided for in the Act:

1. By Section 1, the contract, combination or conspiracy in restraint of interstate or foreign trade territory is recognized as a *status* and that *status* is declared illegal. By Section 3 the contract, combination or conspiracy in restraint of trade in any territory is recognized as a *status* and that *status* is declared illegal. This is a remedy, but if the Act went no further it would simply result that no one could bring a suit to enforce rights established by the agreement which in one form or another is the basis of all contracts, combinations and conspiracies, and possibly that one might by a suit discharge or disengage himself from such agreement. It will be observed that this remedy is not made applicable to the second section which forbids monopolizing or attempting to monopolize.

2. Sections 1 and 3 provide that every person that violates their terms, respectively, by entering into

a contract, combination or conspiracy in restraint of interstate trade, or in restraint of territorial trade, shall be guilty of a misdemeanor and subject to a prescribed punishment. Section 2 provides that every person who violates this section by monopolizing or attempting to monopolize or combining or conspiring with any other person to monopolize any part of interstate trade and commerce shall be guilty of a misdemeanor and subject to a prescribed punishment. It will be observed that these provisions are plain criminal provisions intended to punish criminals for past offenses, without reference to the future, and they are equally applicable to every offender against the Act whichever section he violates.

3. Section 7 provides that any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the Act may sue therefor in the courts of the United States and in his suit shall recover treble damages. This it will be observed is equally applicable to all violators of the law; it has a double purpose—to fully compensate the party injured and to penalize by exemplary damages the party offending (a). It, too, has to do with past offenses and does not concern itself with the future.

4. By section 4 the Circuit Courts of the United States are invested with jurisdiction "to prevent and restrain violations of this Act," and it is provided that the several District Attorneys of the United States under the direction of the Attorney General shall "institute proceedings in equity to prevent and restrain such violations." This has to do with the future. Under it the Court is au-

(a) City of Atlanta *v.* Pipe Co., 127 Fed., 23; aff. 203 U. S., 390.

thorized to prevent the continuance of a *status,* if a *status* has been condemned and declared illegal by a previous section of the statute, and to prevent future action or conduct if there is reason to apprehend that, but for such injunction, a future action or conduct will be committed which if committed would be illegal under the earlier provision of the statute.

5. Section 6 provides that any property owned under any contract or by, or under any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of the Act and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States; it makes provisions for the machinery of seizure and condemnation. It will be observed that this remedy is expressly confined to violations of the 1st section of the Act and has no application whatsoever to the 2nd section.

Looking through these five remedies one can but be struck with the fact that the first and fifth remedies, as here numbered, have application only to violations of the 1st section, and do not apply at all to the 2nd section which forbids monopolizings or attempts to monopolize. Exactly these two remedies, and only these two, have to do with a *status*—a state of being. Why, if a monopoly is a *status* in the sense that one may legally say of a given corporation "That is a monopoly," did not Congress provide in the 2nd section "Every monopoly of the trade or commerce among the several States or any part thereof is illegal," just as it had provided in the 1st section with reference to contracts, combinations and conspiracies in restraint of trade. More significant than this, though: Why did Congress in providing the most drastic remedy for the enforcement of the law, to

wit: that provided in section 6 relating to the seizure of goods in transit, make such remedy applicable only to goods the subject of a contract, combination or conspiracy mentioned in section 1, and leave out the words that would bring under this condemnation the goods of a monopoly existing in violation of section 2 of the Act? It was not on account of any tenderness for the person or persons who had monopolized or conspired with others to monopolize trade and commerce—such persons are treated with exactly the same severity of punishment when convicted by a jury; they are subject to exactly the same power of restraint by the Circuit Courts, sitting in equity; they have to suffer exactly the same compensatory and exemplary damages when sued by the party whose property or business has been injured.

An explanation of this striking difference of remedies as applied to the two classes of offences against the law seems to us easy. Congress in its passage of the Sherman Anti-Trust Law did not recognize a monopoly as a *status*—a state of being—but it recognized monopolizing or attempting to monopolize any part of the trade,—excluding or attempting to exclude others from the trade—as an activity which, if committed, could be punished criminally, and gave a cause of action to the party injured with the right to recover exemplary damages; if threatened—whether directly or by a course of business on the part of the offending person or persons—to be stopped by the injunctive process of the court of equity; but not as a state of being to be declared illegal or otherwise interfered with.

This Court has recognized this condition of the statute in the words already quoted from the *Knight case:*

> "Congress did not attempt thereby (the Sherman Anti-Trust Law) to assert the power to deal with monopoly directly as

such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control or disposition of property."

It may be urged that if the law has only the effect here indicated it falls short of what is required by a wise and just policy; that it is unfair that when a person or corporation has achieved size, power and prosperity by a course of criminal practices—excluding others from the trade—he is to be permitted to enjoy his condition unmolested. The answer to this suggestion is not difficult: In the first place, a statute is to be construed as it is written and not necessarily so as to bring an ideal condition with respect to the subject matter. If it were otherwise, statutes would never require amendment—they would be subject only to a process of judicial amendment dependent upon the will of judges. The statute authorizes the courts to prevent and restrain violations of the Act, and does not authorize them to prevent and restrain from all activities, whether legal or illegal, a person or corporation who has at some time or other violated the Act. The limit of the courts' power is fixed by the statute and the purpose of the courts' injunction must be to prevent future violations and not to punish past. In the second place, though, and considering the matter of policy, if a person or corporation is punished criminally for such illegal practices and is subject to an action for exemplary damages at the suit of any one injured by such illegal practices, and may be prevented by the court sitting in equity from repeating such illegal practices, is not the public well protected against injury from these illegal practices? Whatever the *status* and condition of any person or corporation—however large a proportion he at present enjoys of the volume of trade in a given commodity—there is an abundance of capital seeking invest-

ment in this country, which readily flows from one field of investment to another, to protect the public against injury from such powerful individual or corporation—provided always that such individual or corporation in the future resorts to no practices or methods to exclude from the field of competition such new capital (a).

The foregoing considerations relative to the meaning that Congress intended the second section of the Sherman Anti-Trust Law are urged upon this court not under the apprehension that this record will be found to disclose on the part of any defendant the commission of the crime of monopolizing or attempting to monopolize any part of interstate or foreign trade. As already argued, at perhaps too great length, these defendants have committed no such crime. They have not excluded or attempted to exclude others from the field. Where skill, enterprise and sufficient capital have been united in a competitor in the tobacco business —as in the case of Scotten Dillon Company, of Detroit, as the most conspicuous of many examples —that competitor has found no difficulty in obtaining supplies of raw material, subjecting them to proper processes of manufacture, transporting the manufactured goods to various distributors, and securing their distribution. The court below, though, while rendering opinions that in not convicting impliedly acquitted these defendants of the charges brought under the second section of the Sherman Anti-Trust Law, handed down a decree that seems based upon that second section. Five defendants, The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company and Mac-Andrews & Forbes Company are restrained from engaging in interstate commerce at all—restrained

(a) President Taft's speech accepting nomination for Presidency, July 28, 1908.

from legal, as well as illegal activities—unless and until they can show the restoration "of reasonably competitive conditions." The only inference from such a decree is that each of them is a monopoly (although American Cigar Company and American Stogie Company have, together, less than 15% of the cigar business of the country) as a *status,* and that they must not engage in business until they can show that that *status* has been changed. This certainly justifies, if it does not demand, the argument that monopoly, as a *status,* was never contemplated nor denounced by the Sherman Anti-Trust Law.

It bears on the meaning of Section 1 of the Sherman Anti-Trust Law, but it follows in logical sequence here, to inquire the reason that actuated Congress in making the 2d section of the Sherman Anti-Trust Law applicable only to activities, and not to a state of being. The answer to this inquiry seems to us readily arrived at: Monopoly, considered as a state of being, and having in view that the Government will not grant a monopoly, involves simply the ownership of property. Congress, by declining to condemn monopoly as a state of being, declared its unwillingness or its inability to interfere with ownership of property. Since Congress in the 2d section of the law thus recognized its inability, or thus declared its unwillingness, to interfere with the ownership of property, there should be adopted a construction of the 1st section consistent with the purpose or limitations of Congress thus expressed or recognized by it. Contracts, combinations and conspiracies are states of being, each of them created by entering into, and continued by the continuing operation of a contract or agreement, formal or informal. A monopoly (if any state of being not created by a Government grant can properly be called a monopoly) is simply the ownership of what is, at a given

time, all of a given kind of property, or all the plants at a given time engaged in the production of a given product. Congress, in enacting the 2d section of the Sherman Anti-Trust Law, distinctly avoided forbidding such a monopoly, because of its recognition that ownership of property is indirect, necessarily and always, in its effect on interstate commerce. It is not remarkable, therefore, that this Court declined in the *Knight case* to recognize the purpose or right of Congress to interfere with the ownership of property, in its enactment either of the 1st section of the Sherman Anti-Trust Law, or of the 2d section. It is remarkable, though, that the Government contends that what Congress expressly declined to interfere with in the 2d section, to-wit: the ownership of a large volume of the property at the time engaged in a given business by one person or corporation, falls within the 1st section, which, on its face, at least, only condemns and forbids the continued existence of "contracts, combinations and conspiracies"—words that ordinarily import a continuing concerted action on the part of otherwise independent individuals—persons or corporations—and not the relations of vendee or assignee to the property conveyed or assigned to it.

POINT IV.

A consideration of the prayers for relief of the bill filed by the Government, and a consideration of the decree of the Court below, constitute a strong argument in favor of the construction of both the first and second sections of the Sherman Law contended for by these defendants.

Let us imagine a case altogether like the case of some one or the other of these defendants, and altogether like thousands of cases all over the land: A and B are competitors in some manufacturing enterprise and each sells his goods in interstate commerce. (They may be large or they may be small—for purposes of illustration it may be conceded that they are very large, and have in the aggregate a busness representing more than fifty per cent. of the entire volume of interstate business in such commodity; this concession is made, not in recognition that it makes a particle of difference in the legal aspect whether the aggregate business is more than fifty per cent. or less than ten per cent.—the aggregate business of the defendants in the cigar business is less than fifteen per cent., while in the snuff business it is more than ninety per cent., but the American Snuff Company and the American Cigar Company are treated alike by the decree of the court below.) A and B, in the hypothetical case, consolidate their businesses and in order to conveniently effectuate it a corporation is formed which issues stock to A for his factory, with its good-will, and stock to B for his factory with its good-will. A and B dispose each of part of his stock and it passes into the hands of a great number of people. In the meantime they both die

and the balance goes into the hands of heirs or next of kin. No attempt was made by the Government to stop the consolidation of the properties and business of A and B—but it may be said that the Government was not apprised in advance of their purpose to consolidate. No indictment was had, though, after the act was accomplished and had become notorious, and no goods were forfeited to the Government while in course of transportation from the corporation that resulted from the consolidation of these interests. Years elapse, the consolidating parties are dead, the consolidated property is entirely and thoroughly commingled—all of the original property that was consumable in use has been replaced by new, and most of the buildings and machinery have been replaced by new and improved buildings and machinery. Under these circumstances the Government steps in and says that that consolidation was a combination in restraint of trade because it eliminated the competition that had theretofore existed between A and B, and that on that account the vendee corporation must be stopped from engaging in business, and a receiver appointed to take charge of its property, as though it were an insolvent concern. The court finds that such consolidation did constitute a combination, and, admitting its inability to dissolve the corporation, forbids it to engage in interstate commerce at all unless and until it can show the restoration of reasonably competitive conditions.

These defendants contend, not as an *argumentum ad hominem,* but as a thoroughly legitimate legal argument, to this court having the supreme duty of ascertaining and declaring the purposes and intent of Congress in the passage of the statute, and whether such purpose and intent does, or does not, conflict with the higher law—the Constitution of the United States—that Congress never intended

and could not constitutionally effect either of such results.

The contracts, combinations and conspiracies condemned by the first section of the Sherman Anti-Trust Law are executory contracts, combinations and conspiracies. *Every contract, combination and conspiracy ever condemned by this court, or finally condemned by any other Federal court under this statute, has been an executory contract, combination or conspiracy.* It was certainly so in the *Addyston Pipe & Foundry case,* and just as certainly so in the *Swift case, Montague* v. *Lowry, Continental Wall Paper Co.* v. *Voight,* and every other case dealing with the disposition of manufactured commodities. It was just as certainly so in the *Trans-Missouri case,* the *Joint Traffic case* and the *Northern Securities case*—cases having to do with transportation facilities. Everyone will concede the truth of this statement except as it applies to the *Northern Securities case.* But as viewed by a majority of this court the *Northern Securities case* presented, in a slightly variant form, an instance of a continuing executory combination—the fiction, the *Northern Securities Company,* was a mere instrumentality of continuing the combination into which their respective stockholders had thrust the two competing railway systems. No more striking recognition of this distinction between a real purchasing company, and a company that is a fiction for continuing an executory combination, can be had, than the recent Pennsylvania case in which that court throws doubt on the famous *Morris Run Coal Co. case* cited by this court in the *Northern Securities case,* and holds that the real consolidation under one ownership of competing concerns, that may cheapen production, is not unlawful, although competition is, of course, thereby entirely stopped between them (a).

(a) Monongahela Co. *v.* Jutte, 210 Pa. St., 288, 300.

Congress never contemplated that under this first section of the Sherman Anti-Trust Law property acquired and used should be divested from its owner, or that a corporation actually and actively engaged in interstate commerce should be excluded from such commerce. Congress has no constitutional right to so enact.

In the first place, the Act construed so as to divest property from its owner, is in violation of the provision of the Fifth Amendment of the Constitution of the United States, that no person shall be "deprived of liberty or property without due process of law," in that such construction practically prevents a person from buying from, selling to, or consolidating or forming a partnership with, a competitor.

In *Monongahela Company* v. *United States* (a) Mr. Justice Brewer for the Court declared that:

> "* * * like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment we have heretofore quoted."

In *Adair* v. *United States* (b), Mr. Justice Harlan, speaking for the court, said:

> "We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution."

As the Fifth Amendment protects the individual against action by Federal authority that amounts to a deprivation of liberty or property without due process of law, so the Fourteenth Amendment pro-

(a) 148 U. S., 312, 336.
(b) 208 U. S., 161, 180.

tects him against State action that amounts to a deprivation of liberty or property without due process of law. There can be no contention that the "liberty" protected by the Fourteenth Amendment against State action is not the very "liberty" protected by the Fifth Amendment against Federal action. This Court, speaking through Mr. Justice Peckham in the *Allgeyer case* (a), defines the liberty mentioned in the Fourteenth Amendment, and the definition is undoubtedly equally applicable to the liberty mentioned in the Fifth Amendment, as was recognized by Mr. Justice Harlan for the court in the *Adair case, supra.*

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from a mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful completion the purposes above mentioned."

That corporations are persons enjoying the protection of the Fifth Amendment and the Fourteenth Amendment is established by the decisions of this court. After all, though, according to our view it is not important that corporations have been held to be under the protection of the Fifth Amendment of the Constitution. The right attacked by the Government in the case at bar is the right of individuals—natural persons—to form themselves into corporations; or to sell to corporations; or to buy from natural persons or corporations.

(a) 165 U. S., 578, 589.

The argument that the Sherman Anti-Trust Law is unconstitutional, as an unwarranted interference with the liberty of contract, has been made, or suggested, twice to this court; once in the *Joint Traffic case, supra,* and again in the *Addyston Pipe & Foundry case, supra.* Each time it was made by defendants who sought thereby to justify and protect, under the Constitution, the making of contracts invalid at common law. As forcibly pointed out by Circuit Judge Taft in the *Addyston Pipe & Foundry case* (a), the agreement condemned in that case was utterly invalid at common law, and could not, in the nature of things, have been protected by the Fifth Amendment to the Constitution. The opinion of Circuit Judge Taft delivered in the *Addyston Pipe & Foundry case* shows conclusively that the arrangement or agreement that had been condemned by this court in the *Joint Traffic case* was equally invalid at common law, and Mr. Justice Brewer in his concurring opinion in the *Northern Securities case* so recognizes it.

The contention here made is made on behalf of defendants who have not entered into arrangements and agreements, nor had to do with transactions, invalid at common law; the transactions in this case are the ordinary transactions of consolidation, purchase and sale, lawful at common law; the right to make them is included in the liberty secured by the Fifth Amendment:

> "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto" (b).

In the second place, a corporation, actually and actively enaged in interstate commerce, cannot constitutionally be excluded from such commerce

(a) 85 Federal Rep., 271.

(b) Allgeyer *v.* Louisiana, 165 U. S., 578, 591.

by Act of Congress. Five defendant companies adjudged by the court to be themselves combinations in restraint of trade are forbidden to engage in interstate commerce. This capital punishment is inflicted, not as the result of a conviction by a jury, but by a court of equity, authorized simply to restrain and prevent violations of the Act.

Since *Gibbons* v. *Ogden* (a) it has been recognized that the right to engage in interstate commerce is not a right conferred by the Constitution, but a right that antedates the Constitution:

> "It has been said that the Constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right and gave to Congress the power to regulate it."

The five defendants thus cut off from the enjoyment of a right which antedates the Constitution and was not surrendered by it, are regularly incorporated, *de facto* and *de jure*, corporations. No argument or suggestion is made to the contrary. That corporations are within the protection of the Fifth Amendment to the Federal Constitution and the Fourteenth Amendment to the Federal Constitution, is well settled (b); that corporations are also secure in the possession of those rights and privileges which antedate the Constitution must be equally certain. *Monongahela Co.* v. *U. S., supra,* is conclusive authority for this contention; the corporation there was held entitled to the funda-

(a) 9 Wheat., 1, 211.

(b) Santa Clara County *v.* R. R., 118 U. S., 394, 396.
Monongahela Nav. Co. *v.* U. S., 148 U. S., 312, 336.
Gulf Rway. Co. *v.* Ellis, 165 U. S., 150.
Hale *v.* Henkel, 201 U. S., 43, 76, 85.
Justice Field at Circuit in Railroad Tax Cases, 13 Fed., 722, 746.

mental right of compensation for its property taken for a public use.

This Court has had occasion to consider the rights of corporations in interstate commerce, and has declared those rights equal, so far as Federal authority is concerned, and subject equally to regulation by Congress as the rights of individuals. In *Paul* v. *Virginia* (a) it is said:

> "At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, The Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company may be named among the many corporations then in existence which acquired from the extent of their operations celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general and includes alike commerce by individuals, partnerships, associations, and corporations."

There being then a liberty in natural persons and corporations to engage in interstate commerce, such liberty is not only a right that would be inalienable and indefeasible, if the Federal Constitution were silent with respect to it, but it became a part of the "liberty" that was protected by the Fifth Amendment to the Federal Constitution.

With these contentions neither the *Lottery Case* (b) nor the *Commodities Case* (c) in any way con-

(a) 8 Wall., 168.
(b) 188 U. S., 321.
(c) 213 U. S., 366.

flicts. *The Lottery Case* had for its gist, as stated by Mr. Justice Harlan for the court:

> "But surely it will not be said to be a part of any one's liberty as recognized by the supreme law of the land that it should be allowed to introduce into commerce among the states an element that will be confessedly injurious to public morals."

Even as thus stated the *Lottery Case* was not decided by a unanimous court; four justices dissented (Chief Justice Fuller, Justices Brewer, Shiras and Peckham) on the broad ground that even to accomplish a police purpose, admittedly to be desired, the power of Congress to regulate interstate commerce could not be construed as a power to prohibit. The differences between the *Lottery Case* and the case at bar are striking: (*a*) The decision in the *Lottery Case* is based upon the vicious character of the article dealt in—its amenability everywhere to the exercise of the police power—an element wholly absent from the present case;(*b*) the prohibition is confined solely to the vicious object, lottery tickets, while here the prohibition is *personal* and upon the reasoning adopted must necessarily embrace any objects whatsoever in which the five enjoined companies might be empowered to deal.

> "In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If it be assumed that the states have no right to forbid the consolidation of competing lines because the whole subject is within the control of Congress it would necessarily follow that Congress would have the power to au-

> thorize such consolidation in defiance of state legislation,—a proposition which only needs to be stated to demonstrate its unsoundness" (a).
>
> "The Federal jurisdiction, founded as it is, upon transportation across State lines, is necessarily narrow. It is not a jurisdiction over persons engaged in commerce, but over that commerce which falls within constitutional definition. The power of Congress is founded upon the fact of interstate transportation, or negotiation for interstate transportation; it exists whenever this fact exists, and only then. It is jurisdiction over an act, and no matter how often an individual may perform the act, it never becomes a personal jurisdiction but at the most amounts to control of frequently repeated acts" (b).

In the *Commodities case, supra,* this court stated with emphasis and repetition that its decision did not mean that the power conferred on Congress by the Commerce Clause of the Constitution embraces the right to absolutely prohibit the movement between the States of lawful commodities. Mr. Justice White for the court stated that the argument made for the defendants in the case involved the contention that such right had not been conferred on Congress, and added:

> "The whole support on which the proposition and the arguments rest hence disappears, as a result of the construction which we have given the statute."

The circumstances of the *Commodities Case,* as those of the *Lottery Case,* differentiate it from the case at bar more thoroughly than any argument: (*a*) The railway companies were not forbidden generally to engage in interstate commerce

(a) L. & N. R. R. *v.* Kentucky, 161 U. S., 677, 702. See also, Ashley *v.* Ryan, 156 U. S., 436.

(b) Prentice on Federal Power over Carriers, p. 169.

in the properties specified, but merely to perform the act of transportation while they themselves were the owners of the property transported; (*b*) There was a special reason for prohibiting this particular owner from engaging in interstate commerce in the commodities indicated, in view of the duty of a railway company to give equal treatment to all, and the temptation to disregard this duty when they were engaged in part in hauling their own property. Such reason does not exist here; the defendants enjoined in the case at bar are under no duty justifying an interference with their activities.

It need not be argued that with two constructions of a statute possible, the court will adopt that construction which is not in conflict with the Constitution—indeed when the one construction raises a grave constitutional question and the other does not, the court will adopt the construction which renders the statute clearly and indisputably constitutional. Mr. Justice White, speaking for a unanimous court, stated this doctrine with emphasis and precision in the *Commodities Case* (a):

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which

(a) 213 U. S., 366.

> grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

Under the construction of the statute contended for by the Government and adopted by the court below there is condemned that elimination of competition which comes from ordinary consolidation, sale and purchase. In order to give vitality and effect to such construction there are involved two grave constitutional questions, which, while they have been just argued, may be again briefly stated: First: Is there a constitutional power in Congress to forbid the ordinary transactions that have characterized all commercial peoples, and that were unquestionably valid at common law? Second: Has Congress the constitutional power to prevent a State corporation from engaging in interstate commerce? The court below having construed the Sherman Anti-Trust Law as forbidding the elimination of competition that results incidentally from sale, purchase and consolidation, resolved these two grave questions against the defendants, and under the language of the statute which authorizes it only to restrain and enjoin "violations of the Act," restrained and enjoined the assumed violators of the Act from all interstate activity.

It is another construction of the statute that has been enforced in every case ever brought under it which has come before this court, to-wit: that the first section forbidding contracts, combinations and conspiracies in restraint of trade forbids concert of action in restraint of trade between persons or corporations who maintain their respective individuality. It is practicable for a court to "prevent and restrain" a practice which involves monopolizing trade, or attempting to monopolize it; it is practicable for a court to prevent and restrain the

making, or the continued operation, of an executory contract, combination or conspiracy. These are the things in fact condemned by the Sherman Anti-Trust Law. It is not practicable nor constitutional to prevent or restrain violations of the Sherman Law by saying to the purchaser of private property not affected with a public interest, years after its purchase, you must divest yourself of the property which you have bought and are using, or you must cease to engage in interstate commerce. This very impracticability of constitutional remedy shows, if, indeed, other considerations did not show, that the condemnation of such purchases of property was not intended by Congress, nor accomplished by the Sherman Anti-Trust Law.

POINT V.

The covenants given by various vendors to defendants, not to re-engage in a business to the injury of the good-will sold, are not illegal—they are not contracts in restraint of trade such as are condemned by the 1st section of the Sherman Anti-Trust Law, and the conduct of defendants' vendees in taking them was not monopolizing nor attempting to monopolize trade in violation of the 2nd section of the Act.

The petition of the Government in this case has allegations regarding these covenants, but the prayer for relief does not specifically demand that any one of them be set aside as "a contract in restraint of trade."

That such covenants, limited in point of time and restricted in point of territory so as to be not more than reasonably necessary to protect the good-will conveyed, are valid and do not in any way contravene the Sherman Law was assumed by this Court in the *Trans-Missouri case* (a), the assumption was repeated in the *Joint Traffic Association case* (b) and it was expressly decided by this court in *Cincinnati Packet Co.* v. *Bay* (c). In this latter case there was directly attacked a contract by vendors of certain steamers not to engage in the running of freight or passenger packets between certain points in Ohio for a period of five years. It is true that the interstate business of such packets even if they had run would have been insignificant, but this Court declined to put its decision on the ground of such insignificance of interstate commerce and held expressly that such contracts made as a part of the sale of the business and not as a device to control commerce would not fall within the Sherman Anti-Trust Law. That such contracts are not affected by the Sherman Anti-Trust Law, but are, as indicated in the *Trans-Missouri case,* among those incidental ordinary contracts not intended to be forbidden by that statute, has been expressly decided by subordinate federal courts (d). The validity of such contracts at common law is well established (e).

It may be argued, though, that a policy pursued by a purchaser of many properties of a given

(a) 166 U. S., 327-8.
(b) 171 U. S., 568.
(c) 200 U. S., 179.
(d) Robinson *v.* Brick Co., 127 Fed., 804-7.
Booth & Co. *v.* Davis, 121 Fed., 875-7; aff. 131 Fed., 31.
Connor-McConnell Co. *v.* McConnell, 140 Fed., 412; aff. *idem,* 987.
(e) Fowle *v.* Park, 131 U. S., 88.
National Enameling Co. *v.* Haberman, 120 Fed., 415.
Harrison *v.* Glucose Sugar Ref. Co., 116 Fed., 304.
Addyston Pipe & Foundry case, 85 Fed., 271, 280-2.

kind to take from vendors of such properties contracts not to re-engage in the business for a given number of years, indicates a purpose in such purchaser to exclude competitors from the field, and constitutes therefore an attempt to monopolize the industry, and the trade in such industry.

The circumstances of these contracts have already been discussed in that part of this brief that has to do particularly with the facts (a) and these facts will be only briefly referred to here. These covenants that have been taken from vendors—they have not been taken from all vendors—have been for different periods ranging from one to twenty years and have been confined to certain areas of territory. They have been not to engage directly or indirectly in business in competition with that sold. The area covered by these contracts was large, but the record shows that the good-will of even a small tobacco factory is likely to be coextensive with the country. Tobacco made in Virginia is popular even in New Egland; brands made in North Carolina are the largest sellers in their particular line even on the Pacific Coast; brands made in St. Louis and Louisville have their popularity all over the country. Further it appears that while not always the case it is very frequently true that the name of the manufacturer who originated a brand of tobacco or its products becomes identified in the trade with the goods made by him, as for instance *"Duke's* Mixture," *"Drummond's* National Leaf," *"Garrett's* Snuff;" *Buchanan & Lyall's* Planet." Under these circumstances it is peculiarly desirable in order to prevent confusion in the trade to the absolute destruction of the good-will bought that those whose names are so identified should not be at liberty to engage in business again, and so bring destructive confusion. Moreover the practical desirability of such covenant to

(a) *Ante,* p. 140.

the vendee incidentally appeared abundantly at the trial, as fully pointed out in the brief on the facts. In instances where no such covenants were taken defendants were subjected to unfair competition—vendors to defendants re-entered the business of manufacturing tobacco, advertised their new brands as similar in all respects to brands which they had formerly manufactured under another name, the processes for the manufacture of which they had sold defendants (a). Such a method of competition is undoubtedly dishonest, but it is a method against which these defendants have had repeatedly to contend.

Two facts are obvious about every covenant not to re-engage in business shown by this record, to-wit: (1) that the vendor and covenantor had an existing business and good will extending throughout the territory described in the covenant and (2) that the business of the defendant vendee was so extensive that detriment would have followed if the covenant had not been given. These two considerations show the validity of each of the covenants, considered separately, and bear on the question whether the policy of ordinarily taking them indicates an intent to monopolize the business and constitutes therefore an attempt to monopolize. To further show that they had no such intent, it is to be said: (3) these covenants were taken from the responsible heads—owners of the property conveyed—and not from the skilled superintendents and managers of factories; indeed, it has never been the policy of defendants to take covenants not to re-engage in business, or not to engage in business for concerns other than the defendants, from any superintendents, managers of factories or employes whether its own or of vendors. If it were a part of the policy of defendants to monopolize the tobacco business—the trade in tobacco and its

(a) *Ante*, p. 144.

products—by a system of contractually disabling skilled tobacco men from engaging in the business—it is singular that they do not adopt such policy with their own employes. Here are large corporations, with factories at various points, employing thousands of people, a proportion of whom becomes skilled, some of whom become superintendents and managers of factories—of course, and in the nature of things, some of these employes for one reason or another leave its employ and go into business for themselves, or go into the service of other employers. Not one of them has been imposed upon at his time of need and required, as the price of acquiring his skill in the business of manufacturing tobacco, to sign a contract that disenables him to use that skill at any time and in any way he desires.

It seems to these defendants that these considerations force the conclusion that the covenants referred to have been only incidental to the purchases made, and that they show no intent, and constitute no attempt, on the part of the covenantees to use such covenants to acquire a monopoly in the tobacco trade.

POINT VI.

Neither of the several contracts which were executed at the time of the formation of the British-American Tobacco Company, Limited—ordinarily called the English contracts—nor the British American Tobacco Company, Limited, itself, offends any of the provisions of the Sherman Anti-Trust Law.

With respect to this contention the defendants are in this court wholly appellees. The court below

dismissed the bill as to The Imperial Tobacco Company, the British American Tobacco Company, Limited, both English companies, as well as W. S. Mathews & Sons, T. C. Williams Company and David Dunlop, Incorporated, incorporated under the laws of the States of the United States, owned as to all or a majority of their stock by British American Tobacco Company, Limited. This action of the Court, while accompanied by expressions of Judge Lacombe, which dwell on the absurdity of that public policy which would "prohibit an alien corporation from buying its raw material in this country unless it sends its products here to compete with the American manufacture," is, nevertheless, based on the finding that there was nothing illegal in the contracts that established and accompanied the establishment of British American Tobacco Company, Ltd., whether on the part of The American Tobacco Company and The Imperial Tobacco Company, the vendor parties, or British American Tobacco Company, Ltd., the vendee party, the corporation formed by a consolidation of part of the interests of the other two.

The Government has appealed, though, from that part of the decree which thus dismisses the bill, and it therefore becomes the duty of these defendants to defend in this brief and argument the legality of that transaction. Such defense need not be long; the contentions of these defendants with respect to this transaction are fully covered by the legal principles already referred to and contentions already made.

From the time of its organization The American Tobacco Company had a business in England and in other foreign countries. This business was principally in cigarettes, and during the last few years previous to 1902 the business had been advanced with considerable enterprise and energy to

the benefit, in the extension of their market, of American growers of leaf tobacco, so that in 1902 The American Tobacco Company controlled by stock ownership separate local companies engaged in the manufacture of cigarettes out of the American grown leaf, in Germany, Canada, Australia and Japan, and besides that, sold from its own factories in the United States great numbers of cigarettes in China and India. For many years it had sold in England cigarettes manufactured in its American factories, but in 1901 the differential in the English tariff duties in favor of the imported raw material as against the imported manufactured product, and the activity of English manufacturers in popularizing in the English markets cheaper cigarettes, had reduced the volume of the English trade of The American Tobacco Company. So in 1901 it acquired through transfer of stock to it substantially a complete ownership of the manufacturing plant of Ogden's, Limited, an English cigarette manufacturer, with a factory at Liverpool. Being thus put on a tariff equality with English manufacturers it rapidly extended its English business during the latter half of 1901 and the first half of 1902, still utilizing for this purpose American grown leaf, but manufacturing it in England through this Ogden's, Limited, organization. Possibly on account of the apprehension of the competition from a strong, well organized company, some of the leading English tobacco manufacturers, during the latter half of 1901, caused the formation of The Imperial Tobacco Company and sold their manufacturing plants to it. The brands that this Imperial Tobacco Company manufactured had already had some, though limited, sale in the United States; the sale here was necessarily limited unless The Imperial Tobacco Company saw fit to establish manufacturing plants here, for it is the policy of this country in its tariff regulations (whether in

its anti-trust suits or not), to discourage the importation of manufactured tobacco, and a duty of 55 cents, with a still heavier duty on cigarettes, is collected upon the importation of these products, in addition to the internal revenue tax which they, as well as the products of domestic manufacture, have to pay. It does not appear in this record that The Imperial Tobacco Company or its predecessors had in active or serious contemplation the establishment of factories in this country, though it was always apparent that if they or any other manufacturers with the good will and good reputation which their business had, began the manufacture of tobacco and cigarettes in this country, using the same processes of manufacture and brands as theretofore used in England, there would be easily created an increasing market and demand for those goods.

In September, 1902, as the result of negotiations entered into and conducted in England, the defendant The American Tobacco Company sold to the defendant The Imperial Tobacco Company its English business, including such tangible assets as it had in England and the whole undertaking of Ogden's, Limited; The American Tobacco Company and Continental Tobacco Company, which entered into the sale for that purpose, conveyed to The Imperial Tobacco Company the right to use in England any of their processes of manufacture with the accompanying right to use on the products of such processes of manufacture the brands originated and used by The American Tobacco Company and Continental Tobacco Company respectively. As part of the same transaction The Imperial Tobacco Company sold to The American Tobacco Company what is called "its American business," that is, the right to use in America its processes of manufacture then or thereafter used by The Imperial Tobacco Company in its English business,

with the right also to use on the products of such processes of manufacture the brands used by The Imperial Tobacco Company. In view of the value of tangible assets owned directly or indirectly by The American Tobacco Company in England, and the greater volume of English trade that The American Tobacco Company had than of American trade possessed by The Imperial Tobacco Company, The Imperial Tobacco Company paid for what it acquired from The American Tobacco Company not only its American business as aforesaid, but an amount of its share capital—considerable in value, considered absolutely, but relatively small, less than 10%.

As a separate but contemporaneous transaction The American Tobacco Company, Continental Tobacco Company, Consolidated Tobacco Company and American Cigar Company on the one hand and Imperial Tobacco Company on the other, agreed to consolidate their properties so far as such properties were used in trade foreign to the United States and foreign to the British Empire. To effectuate this, they caused the formation under the laws of Great Britain of the British American Tobacco Company, Limited, to which each of the contracting parties conveyed absolutely the foreign factories directly or indirectly held or owned by it respectively as well as the right to use in such foreign factory or factories thereafter established by British American Tobacco Company, Limited, processes for manufacture then or thereafter used by either of the vendor companies, with the right also to use in such foreign countries on the products of such processes of manufacture the brands used by the vendors respectively.

British American Tobacco Company, Limited, issued its stock in corporation of one-third to The Imperial Tobacco Company and two-thirds of The American Tobacco Company and the other Ameri-

can companies, and these companies advanced cash, in the same proportions, to British American Tobacco Company, Limited, to an amount of more than $5,000,000. By these conveyances the British American Tobacco Company, Limited, acquired large properties with a valuable good will, and it has since used these properties and increased them and enlarged its business as any other owner.

In order to assure to the respective vendees the enjoyment of the good will conveyed, and in order to assure to each respective vendor that the property conveyed by it would not be used to compete with the business retained by it, the American companies agreed with The Imperial Tobacco Company that they would not engage or be interested otherwise than as stockholders of the Imperial Tobacco Company in manufacturing or selling tobacco in England, the Imperial Tobacco Company agreed with the American companies that it would not, except with their permission, engage or be interested in the manufacture or sale of tobacco in the United States, and both the Imperial Company and the American companies agreed with the British American Tobacco Company that they would not, except as a stockholder in it, be interested or engage in the manufacture or sale of tobacco in countries other than the United States of America and the British Empire. The British American Tobacco Company, Limited, represented by trustees, agreed with the other companies that it would not be engaged or interested in the manufacture or sale of tobacco except in countries foreign to the United States of America and the British Empire (a). A few representative directors of the American companies and the Imperial Tobacco Company — eight from the American companies and twelve from the Im-

(a) For a further discussion as to the facts, see *ante*, p. 47. The two contracts are filed as Exhibits to the Bill of the Government and printed in full. Record, Vol. 1, p. 111.

perial Company — entered into these covenants along with their respective companies.

The first thing that suggests itself with regard to this transaction is that it at least furnishes no justification of the charge that these American defendants are seeking to monopolize trade. They had a large and growing business which they sold for a small interest in an English company, over which they have never exercised the slightest control or influence, and they have by selling part of the Imperial Tobacco Company's securities acquired by them, diminished even that interest in the English tobacco business. There has thus been a segregation of part of their tobacco business, and so complete a segregation that it has passed entirely beyond their control, and not the greedy aggregation which by the theory of the Government has always characterized these defendants.

The second thing that suggests itself is that there has resulted no injury to American commerce by this English transaction. There is no evidence that there has been any diminution in the requirements of American leaf for the English market, but the evidence is explicit that the use by the British American Tobacco Company of American grown leaf has increased from 20,000,000 pounds in 1903 to 30,000,000 pounds in 1906 (a)—an increase it is easy to believe brought about largely by the greater efficiency and enterprise in opening up foreign markets which have resulted from the consolidation of 1902. There has been not only no diminution in demand for American grown leaf — and after all aggregate demand is what makes for higher prices —but there has been no elimination of a competitor. If any fact is established by this Record it is that the competition for the purchase of leaf tobacco be-

(a) *Ante*, p. 53.

tween The American Tobacco Company and The Imperial Tobacco Company is real(a). Why should it not be real when The Imperial Tobacco Company owns no stock in The American Tobacco Company, and The American Tobacco Company owns less than 5% of the stock of The Imperial Tobacco Company? So that while, for motives of convenience and as a subsequent arrangement, and not at all as provided for in the contract of September, 1902, The American Tobacco Company buys the requirements of leaf tobacco of British American Tobacco Company, Ltd., in this country, on all of these types of tobacco exactly the two competitors that existed before the contract of September, 1902, was made, exist now. The only effect of the arrangement is that The American Tobacco Company buys now more of those types of leaf and The Imperial Tobacco Company less.

The third thought that suggests itself is the thought that was evidently in the mind of Circuit Judge Lacombe when he asked what public policy would be served by prohibiting a foreign corporation from buying its raw material in this country. Of course such considerations would not induce this Court to refrain from declaring illegal what is in truth an illegal contract, but it is not to be forgotten that this is an English contract and the only illegality which may be considered here is the alleged violation of the Sherman Anti-Trust Law involved in the operation of the contract so far as it operates in this country. The Imperial Tobacco Company has, as its only activity in this country, the purchase of American grown leaf tobacco. The British American Tobacco Company, Ltd., has, as its only activity in this country, the purchase through The American Tobacco Company of American grown leaf tobacco and the employment of

(a) *Ante*, p. 69.

American labor in manufacturing the products to be shipped abroad, which latter activity is carried on to the extent, but only to the extent, that it may be profitably carried on, considering the tendency of foreign countries to establish tariff differentials against the imported manufactured article as compared with the imported raw material. Are these activities to be condemned as illegal under the Sherman Anti-Trust Law, and is an enlightened public policy of this country to be served by depriving these foreign companies of the right to pursue such activities here? There would result inconvenience to them, but real injury to the tobacco growers, the tobacco workers and the commerce of the country. They would confine themselves to their foreign factories and would depend for their supply of tobacco (to the extent that they found it impossible to substitute tobaccos grown in other countries for tobaccos grown in America) upon those who might bring the tobacco to them; but the American workmen would be out of employment and the American leaf growers would have their market curtailed or embarrassed.

Passing from these considerations, though, these defendants earnestly and confidently contend that there is nothing illegal in these English contracts and would not be even if they had been negotiated and entered into within the local jurisdiction of the Congress of the United States and had their only operation and effect here:

FIRST.—The formation of British American Tobacco Company, Ltd., by The Imperial Tobacco Company and the American Tobacco companies and the subsequent conveyance to it of parts of their respective properties is no more nor less in its legal essence than the transaction entered into daily and in every locality of forming a partnership between manufacturers and traders, thereto-

fore competitors, and of merging, under State statutes intended to facilitate such mergers, corporations theretofore engaged as competitors in trade.

SECOND.—The reciprocal covenants entered into by the parties to this English transaction accompanied a *bona fide* sale and purchase of substantial property interests and are abundantly sustained by the authorities already cited. If it be said that the property sold by The Imperial Tobacco Company—its so-called American business—was too insignificant in the value of its good will to reasonably support the covenant of Imperial Tobacco Company not to engage in business here, and that therefore the covenant was the main thing, with the sale only as an incident, it may be answered that, however inconsiderable the business that The Imperial Tobacco Company sold, the business that it bought was a very large one. It bought not only all the tangble property of Ogdens' Limited, which had cost The American Tobacco Company millions of dollars, but it bought the right to know and use all the secret formulæ and processes of manufacture that the American companies owned and used. From this standpoint alone, and without considering the Imperial Tobacco Company as the vendor of property at all, its covenant comes clearly within the reasons given by Circuit Judge Taft in the *Addyston Pipe & Foundry case* (a) for holding such covenants given by a vendee valid:

> "Again when one in business sold property with which the buyer might set up a rival business it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property."

(a) 85 Federal, 271, 280-281.

This discussion of Circuit Judge Taft was only following the decision of this Court in *Navigation Co.* v. *Winsor* (a).

It cannot be said that these covenants are void because they are unrestricted in time. At a very early date, the English courts established that a covenant unlimited as to time is valid (b). The court held that the object of such covenants was to give to the vendee the right to sell the business himself if he so desired and hence

> "that the only effectual mode of doing this appears to be by making the restriction co-extensive with the servant's (vendor's) life."

This doctrine has never since been doubted and it has been applied in many cases (c).

The doctrine of the American cases is no less liberal than that of the English. A covenant is valid "though it is to last for the life of the promisee, or though no time limit is imposed" (d). The reason for this rule with respect to corporations is twofold. In the first place, regardless of the vendees' right to sell, it is obvious that the covenantee needs a protective covenant co-extensive with its own life and the covenantees in the case at bar were perpetual; in the second place, regarding the vendee's right to re-sell, the covenant should not be limited to the life of the covenantee, but, as was said in *Hitchcock* v. *Coker* (*supra*), it should extend also to the life of the covenantor, and the corporation covenantors in the case at bar are perpetual in their

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(a) 20 Wall., 64.
(b) Hitchcock *v.* Coker, 6 Ad. & El., 438 (1837).
(c) Archer *v.* Marsh, 5 Ad. & El., 959.
Mallan *v.* May, 11 M. & W., 653.
Pemberton *v.* Vaughan, 10 Q. B., 87.
Atkins *v.* Kinnier, 19 L. J. (Exch.), 132.
Elves *v.* Croft, 10 C. B., 241.
Avery *v.* Langford, 23 L. J. (Ch.) 837.
(d) Page on Contracts, Sec. 380 and cases cited.
National Enameling Co. *v.* Haberman, *supra.*

lives. So that, however it is considered, and this not only with respect to technical law but the law of reasonableness as applied to the particular transaction, these covenants are not, because they are unlimited in time, invalid and illegal.

It has been suggested that whatever may be said of the reciprocal covenants between The Imperial Tobacco Company and The American Tobacco Company the contracts entered into by the Continental Tobacco Company, Consolidated Tobacco Company and American Cigar Company were void because these three companies neither bought nor sold. This is inaccurate. The Continental Tobacco Company sold to The Imperial Tobacco Company its processes for the manufacture of tobacco and the brands to be used on the products of such manufacturing processes so far as England was concerned, and to the British American Tobacco Company the same things so far as countries foreign to England and the United States are concerned. American Cigar Company made no sale, but it entered into contracts with The Imperial Tobacco Company with respect to the handling and distribution of its cigars in England. Consolidated Tobacco Company was not a manufacturer at all, but it was the owner of the majority of the common capital stock of both the Continental Tobacco Company and American Tobacco Company—it has never been deemed illegal for the individuals interested in a vendor corporation or a vendee corporation to join such corporation in such covenants (a).

Suppose it be true, though, that the English parties to the transaction, knowing that The American Tobacco Company, Continental Tobacco Company and Consoldiated Tobacco Company had a common president and many common stockholders, and that the American Cigar Company was controlled by the same interests, were over zealous and over cautious

(a) Electric Co. *v.* Hawks, 171 Mass., 101.

in protecting themselves against an impairment of the good-will which they were purchasing and for which they were paying securities worth millions of dollars, and that there was no sufficient reason for some of these companies entering into the covenant, is the validity of the whole transaction to be on that account denied?

These defendants have no misgivings as to the validity of their contention that these covenants that were part of the English transaction were reasonable and valid. But even if they should be mistaken about this and the covenants should be declared void because unlimited in time, or because not reasonably necessary to protect the good will acquired, nor reasonably necessary to protect the good will retained, by the respective vendees and the respective vendors, the effect of such would not be to invalidate the whole transaction. The main transaction revealed in these English contracts was the formation of British American Tobacco Company, Ltd., and the sale to it of certain property with the good will thereof by the American companies and the Imperial Tobacco Company; the sale to The Imperial Tobacco Company by the American companies of certain properties and the sale by the Imperial Company to the American companies of certain properties. Unless these sales are void; unless this Sherman Anti-Trust Law is to be given the revolutionary effect of forbidding a sale by one competitor to another; this transaction must stand, whatever the fate of the reciprocal covenants not to engage in business in certain territory executed by the respective parties.

POINT VII.

British American Tobacco Company, Limited, has not monopolized nor attempted to monopolize any part of interstate or foreign commerce.

British American Tobacco Company, Limited, does no *interstate* commerce except in its shipments of raw material from the point of purchase in one State to the point of manufacture in another. It will not be contended that there has been any successful or unsuccessful attempt to monopolize that commerce. No person has been by it excluded or embarrassed in his purchase of leaf tobacco or his shipment of it to his own factory.

The real commerce that the British America Tobacco Company, Limited, does or initiates in the United States is the shipment of manufactured tobacco or the products of tobacco from its factories in the United States to foreign countries, and the shipment of leaf tobacco and raw material from the United States to its factories in foreign countries. It is true that British American Tobacco Company, Limited, markets in foreign countries much more of the products of tobacco manufactured in the United States than any other manufacturer of the United States, and indeed more than all other manufacturers in the United States combined. The story of its activities and enterprise in opening up new countries and the consumption of the products of American grown leaf tobacco altogether explains that situation (a). The difficulties—not created nor magnified, but rather minimized by British American Tobacco Company, Limited—that would confront the smaller manufacturer in

(a) *Ante*, p. 53.

doing a trade in many foreign countries (a) explains the absence of such smaller manufacturers from the foreign markets.

As heretofore argued, the large, absolute or relative, volume of one's business, though, does not convict one of monopolizing or attempting to monopolize unless there has been a successful or unsuccessful attempt to destroy or abridge another's opportunity for trade. The record discloses absolutely no such attempt on the part of British American Tobacco Company, Limited.

More than that, this record induces the belief that the trade that British American Tobacco Company, Limited, enjoys is a trade that, but for its existence, would not be enjoyed by any American manufacturer, but would either not exist at all, or would exist for the continued benefit of the producers of leaf tobacco in India, China and the other foreign countries. This record puts British American Tobacco Company, Limited, in a singularly favorable attitude so far as American commerce is concerned. It is necessarily the fact with respect to any American manufacturer whose products are sold in America that it is questionable how much he has actually increased the volume of trade in the given commodity, and how much of what he has he has simply taken from a competitor. This is not the case with British American Tobacco Company, Limited. What it has it and its predecessors created, and it has prospered, not at the expense of any American manufacturer, but only to the advantage of American laborers and American leaf tobacco growers.

(a) *Ante*, p. 53.

POINT VIII.

The doctrine of stare decisis may be invoked with propriety and effect in favor of all these defendants, and with respect to each and all the transactions involved.

One of the early proceedings instituted under the Sherman Anti-trust Law was an indictment in Massachusetts against individuals alleged to have been instrumental in the organization and the affairs of the Distilling & Cattle Feeding Company. In an effort to remove one of the defendants to the District of Massachusetts for trial, Circuit Judge Jackson in 1892 gave earnest consideration to, and luminous exposition of, the Sherman Anti-trust Law. It will not be denied that in the *Green case,* Judge Jackson held that it was not in violation of the Sherman Law for competitors engaged in the manufacture and sale of distillery products, to combine by the formation of a corporation which took over from them their plants theretofore used in competition, and purchased or otherwise obtained control of distilleries in the United States at the time producing seventy-five per cent. of all the distillery products of the United States; and that it was not in violation of the Sherman Anti-trust Law for this combination to put into effect selling schemes or methods by the terms of which customers who purchased only from such combination and maintained prices, were enabled to purchase the goods from the combination at a lower price than other purchasers (a).

There were efforts to transfer various of the defendants in the Distilling Company case to Massachusetts for trial, and in that way District Judge Ricks, Circuit Judge Lacombe and District Judge

(a) In re Green, 52 Fed., 104.

Nelson had occasion to pass on the indictment. None of them entered into so considerable a discussion of the matter as Circuit Judge Jackson, but each of them agreed with Circuit Judge Jackson's conclusion (a).

Soon after this indictment, there was a proceeding in equity brought against the American Sugar Refining Company and others. Before this latter case was tried in the lower court, Circuit Judge Jackson had been elevated to the Supreme Court Bench, and the lower court, in the *Knight case*, instead of discussing at considerable length the questions raised, referred to Judge Jackson's opinion in the *Green case* heretofore cited, as controlling (b); the Circuit Court of Appeals of the Third Circuit did exactly the same thing (c), and the case came to this Court and was decided by it in January 1895 (d). In this case there was not considered the matter of trade methods, such as had been considered in the *Green case*, but there was considered by this Court the same question as had been theretofore considered in the *Green case*, so far as the acquisition of manufacturing plants was concerned, and this Court decided, with one dissenting Justice, that the purchase by a corporation engaged in interstate commerce of the entire share capital of four of its competitors similarly engaged in interstate commerce, in exchange for shares of its own stock, even when such purchase was made "for the purpose of securing a more perfect control over the manufacture and sale" of a necessary of life within the United States, and even when by such purchase the vendee corporation acquired control to the extent of ninety-eight per cent. of the

(a) 51 Fed., 205;
51 Fed., 213;
50 Fed., 469;
(b) 60 Fed., 306;
(c) 60 Fed., 934;
(d) 156 U. S., 1.

article manufactured and sold within the United States, was not that *direct* interference with interstate commerce necessary to bring the transaction under Federal control, and, therefore, constituted no violation of the Sherman Anti-Trust Law.

The authority and validity of this construction of the statute was, of course, recognized by courts, departments of government, lawyers, and inhabitants of the country generally. In his annual report for 1895 Attorney General Harmon referred to the decision by this Court in the *Knight case*, describing it as follows:

> "It was held that the purchase of certain sugar refineries in the City of Philadelphia on behalf of the so-called 'Sugar Trust,' was not a violation of the provisions of that law, although a virtual monopoly of the business of refining sugar resulted, because interstate commerce was not thereby directly affected."

And he declared that combinations, or even monopolies

> "Cannot be reached under this law simply because they are combinations and monopolies, nor because they may engage in interstate commerce as one of the incidents of their business." (a)

In the following year the same Attorney-General says:

> "The restricted scope of the provisions of this law as they have been construed by the courts, especially in *United States* v. *E. C. Knight Company,* makes amendment necessary if any effective action is expected of this Department." (b)

In 1899 Attorney-General Griggs discussed the *Knight case* at some length, and in the course of his discussion, says:

> "Whatever may be the evils arising from corporate or other aggregations of capital,

(a) Annual Report of Atty.-Gen. 1895, p. 13;
(b) Annual Report of Atty.-Gen. 1896, p. xxvii.

> or from the comprehension under one management of various industrial or manufacturing establishments that would otherwise be engaged in competition; whatever may be the disadvantage of having one carry on several branches of business which might be carried on by separate persons; all of these things are done by virtue of the appropriate and constitutional authority of the several States under State law, and except where they invade the territory of Congressional jurisdiction by interfering with interstate or international commerce in a direct manner, they are subject and subordinate to the restraint and control of the individual States where they are carried on." (a)

In 1906, Attorney-General Moody, in his summary of what had been definitely established by the decisions of this Court, under the Sherman Law, said:

> "In the course of this litigation it has been made clear by the decisions of the Supreme Court: * * * Second, that a combination of manufacturers to restrain or monopolize manufacture or production which only incidentally and indirectly affected interstate commerce, was not within the prohibition of the Act because not a restraint of interstate commerce (*U. S.* v. *E. C. Knight Co.*, 156 U. S., 1) (b).

In 1907, Attorney-General Bonaparte, in an official letter, discussed the effect of the *Knight case* as follows:

> "The case of United States *v.* E. C. Knight Company (156 U. S., 1) determined, in substance, that the acquisition by the so-called 'sugar trust' of a controlling interest in four refineries, which at the time of such acquisition constituted, for practical purposes, its only competitors in the United States, did

(a) Annual Report of Atty.-Gen. 1899, p. 21 *et seq.*
(b) Report of Atty.-Gen. for 1906, p. 7.

> not involve a violation of the Sherman Act which would justify a suit in equity on the part of the Government to cancel the agreements, by virtue of which the controlling interest in these several corporations had been so acquired by the said so-called 'trust.' The Supreme Court held thus, although, in the language of Judge Butler in the circuit court, 'the object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country' * * * I may perhaps make my meaning a little clearer if I say that I understand the Knight case to have decided, first, that the mere acquisition of the controlling interest in competing refineries did not violate the act; second, that such acquisition, plus the purpose in making it to obtain a 'more perfect control' over the business in which the trust is engaged throughout the entire country, did not amount to a breach of the law. This is my view of the decision in the Knight case" (a).

References to contemporary and subsequent law literature might be multiplied to show that the whole body of public opinion of the country altogether agreed with the Attorney-Generals in the belief that the *Knight case* and the *Green case* settled the effect of the law; (b) State after State have passed legislation permitting corporations to acquire stock in other corporations, and permitting mergers of corporations; and all men who knew of the law at all, whether lawyers or laymen, concluded that, whatever else might be forbidden by the law, there was not forbidden the combination of the property of manufacturers, even

(a) Senate Doc. No. 687, 2nd Sess. 60th Congress, p. 27.

(b) 7 Columbia L. Rev., 93 (Judge Noyes); 29 Am. L. Rev., 293 (Editorial); 34 Am. L. Rev., 194 (E. W. Huffcut); 7 Harvard L. Rev., 167; 1 Va. L. Reg., 709; 2 Va. L. Reg., 160; 2 Eddy on Combinations, sec. 818 *et seq.;* Spelling on Monopolies, p. 227.

of those who sold their products in interstate commerce, and whether the combination was effected by direct transfer of physical property, or the transfer of capital stock—provided that the latter was permitted by the law of the State.

In 1896 this Court decided without a dissenting voice that the merger of corporations organized under State laws, is a matter entirely of State concern, subject in no way to Federal control; and this although the corporations so to be merged were railroads engaged directly in interstate commerce (a). The opinion in this case, although it did not cite the *Knight case,* yet proceeded upon substantially the same ground, to wit: that the transaction of merging State corporations engaged in interstate commerce is not direct in its relation to interstate commerce at all. Having held that the merger of railroad corporations was a matter of State concern, it follows, *a fortiori* from this decision that the amalgamation of manufacturing concerns through a merged corporation or co-partnership is a matter of State concern, not direct in its effect on interstate commerce, and not subject to the regulation of Federal legislation.

Now to say nothing of the *Green case,* it was only after the decision in the *Knight case* that ninety-five per cent. in number and in volume of the purchases attacked in the litigation at bar were made; up to the decision of the *Knight case,* not a single corporation defendant in the case at bar had owned shares of stock in any other corporation; the purchases of stock that have been made since do not involve all of the features that were urged against the defendants in the *Knight case;* these defendants have acquired stocks for cash or property, and not

(a) Louisville & Nashville R. R. Co. *v.* Kentucky, 161 U. S., 677.

in exchange for their own stock, and the stocks now held by them represent simple cash investments.

It was after the decision in the *Louisville & Nashville Railroad case,* and after the proposed Merger had been approved by the State Courts of New Jersey, the only courts which, under the *Louisville & Nashville Railroad case* had jurisdiction of the matter, that the Merger resulting in the present The American Tobacco Company was accomplished.

With the exception of the formation of the original The American Tobacco Company (which, having been dissolved by the merger of 1904, is, in fact, not really a defendant here; and the formation of the original The American Tobacco Company was consummated before the passage of the Sherman Anti-trust Law), the formation of each of the five corporations declared by the decree in the court below to be in itself a combination in restraint of trade, indeed, the formation of each corporation a defendant in the case at bar, occurred after the decision of these two cases; their legality was advised upon the authority of these two cases; the purchases made and the transactions complained of have proceeded upon the authority of these two cases.

These are considerations of tremendous importance. As has been heretofore contended in this brief, the transactions at bar fall as completely within the transactions of one or both of these two adjudicated cases as the transactions of a case at bar will ever fall within the transactions of a case decided. If the doctrine of *stare decisis* is to ever have applicability, it is in the case at bar, for large investments have been made, large properties have been acquired by these defendants—and one cannot close one's eyes to the fact that these defendants are only in the position of individuals

and corporations all over the land—upon the authority of adjudicated cases of this Court; the construction of those doctrines of this Court here contended for has been conceded by the Executive Departments of the Government, as well as lawyers and laymen throughout the country, and upon these cases and their universal construction money has been invested and businesses built up. It is not contended that the provision of the Constitution against the enactment of *ex post facto* laws, prevents this Court overruling its former adjudications; but it is contended that when such prior adjudications have become rules of property, the basis of business enterprises of large magnitude, and when to overrule these adjudications would make wrecks of these enterprises, and criminals of their promoters, a case of such close analogy to *ex post facto* laws is presented that the maxim *stare decisis* becomes almost as if its salutary principle had been embodied in the Constitution itself.

> "It is almost as important that the law should be settled permanently as it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly unless clearly erroneous. Vacillation is a serious evil. *Misera est servitus ubi lex est vaga aut incerta*" (a).
>
> "*Stare decisis* is a wholesome doctrine" (b).

If the *Northern Securities case,* decided almost ten years after the *Knight case,* overruled or modified these two decisions (and it is that case which it is argued did have such effect), it is in spite of the declaration by Mr. Justice Harlan, delivering the opinion of the Court, that no such effect was involved.

> "There is no pretense that the combination here in question was under the author-

(a) Gilman *v.* Philadelphia, 3 Wall., 713, 724.
(b) Vail *v.* Arizona, 207 U. S., 201, 205.

ity of the State under whose laws these railroad corporations were created. But even if the State allowed consolidation it would not follow that the stockholders of two or more state railroad corporations, having competing lines and engaged in interstate commerce, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and by destroying competition between them, in violation of the Act of Congress, restrain commerce among the States and with foreign nations" (a).

"There was no actual investment in any substantial sense, by the Northern Securities Company in the stock of the two constituent corporations. If it was in form such a contract it was not in fact one of that kind. If any one had knowledge of what was designed to be accomplished by the combination it was the defendant Morgan. In his testimony he was asked, 'Why put the stocks of both these (constituent companies) into one holding company?' He frankly answered: 'In the first place, this holding company was simply a question of *custodian,* because it had no other alliances.' That disclosed the actual nature of the transaction, which was only to organize as a *holding* company, in whose hands, not as real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of these constituent companies" (b).

It is to be noted also that it was after and not before the decision of the *Northern Securities case* that Attorney-Generals Moody and Bonaparte gave their opinions, already quoted, as to what had been—and presumably still was—established by the *Knight case.*

(a) 193 U. S., at 338.
(b) 193 U. S., at 353.

POINT IX.

The petition of the Government ought to be dismissed as to all of these defendants.

Respectfully submitted,

JOHN G. JOHNSON,
WM. J. WALLACE,
W. W. FULLER,
DE LANCEY NICOLL,
JUNIUS PARKER,
Of Counsel.

APPENDIX.

The Sherman Anti-Trust Act.

AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SECTION 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District

of Columbia, or with foreign nations, or between the District of Columbia and any State or States and foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SECTION 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SECTION 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

SECTION 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

SECTION 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SECTION 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.

FILED.
DEC 27 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 316.

UNITED STATES OF AMERICA,
Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Appellee.

BRIEF FOR THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, LIMITED, APPELLEE.

WILLIAM B. HORNBLOWER,
JOHN PICKRELL,
WILLIAM W. MILLER,
MORGAN M. MANN,
Of Counsel for the Imperial Company, Appellee.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

In the Supreme Court of the United States.

OCTOBER TERM, 1909. NO. 316.

THE UNITED STATES OF AMERICA,
Appellant,

AGAINST

THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, LIMITED,
Appellee.

BRIEF FOR THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, LIMITED, APPELLEE.

This is an appeal by the United States from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing the petition or bill of the United States in this suit, as against the defendant The Imperial Tobacco Company of Great Britain and Ireland, Limited.

That Company is a corporation created under the laws of Great Britain, as is also the British-American Tobacco Company, as to whom also the bill was dismissed.

The ground on which the bill was dismissed as to these two Companies was that they are British corporations and that the contracts entered into by them with the American Tobacco Company were entered into by them in London, England, where such contracts were legal and proper, and that they have

not been carrrying on business in this country in violation of the Sherman Act.

See opinion of Judge LACOMBE, page 294 of the record,

where he says:

"The Imperial Tobacco Company of Great Britain and Ireland (Limited) is one of the defendants. It is a British corporation and entered into a contract with the American Tobacco Company in the city of London, where such contract was a legal and proper one. It is apparently the contention of petitioner that subsequent acts of the Imperial Tobacco Company in this country practically amount to the entering into a combination or contract of the sort specified in the statute. So far as appears the only transactions of that company here are these: It buys leaf tobacco of the American grower in very large quantities by its own independent force of purchasing employees; it does not sell its manufactured products here—indeed, such products, having to pay both tariff duties and revenue tax, could not be sold here except at a loss, save in the case of a few fancy high-priced brands. It may be an enlightened public policy to prohibit an alien corporation from buying its raw material in this country unless it sends its products here to compete with American manufacturers; but if it be, this act seems not to have gone to that extent. The petition should be dismissed as to the Imperial Tobacco Company. A like disposition should be made as to the British-American Company."

See also opinion of Judge COXE, at page 295 of the record,

where he says:

"As we are unanimous in thinking that the testimony shows no case for a receiver and that the bill should be dismissed as to the defendants

The Imperial Tobacco Company and the British-American Company, nothing need be added to what Judge LACOMBE has written in arriving at these conclusions."

The opinions of the Court below are reported 164 Fed. Rep., 700. See as to Imperial Company, pages 703, 704.

It is not claimed by the Government that the Imperial Company or the British-American Company is in anywise responsible for anything that took place prior to 1902, at which time the Imperial Company entered into contract relations with the American Company, and at which time the British-American Company was formed.

A great mass of testimony taken on the hearings in this cause has to do with the alleged combinations entered into by The American Tobacco Company and its allied Companies in this country, with which the Imperial Company and the British-American Company have no concern. It is claimed, however, by the Government that the contracts entered into by the Imperial Company in 1902 were themselves a violation of the Sherman Act, and that the transactions of the Imperial Company since that date have been in violation of the Act. To these questions we shall address ourselves.

Statement of Facts.

The Imperial Company is a British corporation, organized under English law in October, 1901. It was organized with a capital stock of eighteen million pounds sterling. As originally organized it had no relations whatever with The American Tobacco Company or any other of the defendants, nor did any of the defendants own a share of its stock. It was organized for the purpose of bringing into co-operation a number of leading tobacco manufacturers of Great Britain. It is charged in the Bill of Complaint or Petition that the result of its organization was to

create a monopoly of the business of manufacturing tobacco in Great Britain. This charge is denied by the answer of The Imperial Company. No proof was adduced by the Government in support of the charge, and the testimony established the contrary. It is *not claimed*, however, in the Bill of Complaint or Petition that the purpose of organizing The Imperial Company was to create a monopoly of the business of manufacturing tobacco *in the United States* or to restrain trade or commerce *between the various States* of this country or *between this country and Great Britain.*

In September, 1901, The American Tobacco Company, finding it impracticable to successfully compete in Great Britain with British manufacturers, by reason of discriminating differentials against imported tobacco products manufactured abroad, had purchased control of a Liverpool Corporation, organized under the laws of Great Britain and doing business in Great Britain, known as " Ogden's Limited ", which was engaged in the business of manufacturing, selling and dealing in tobacco products. A trade conflict arose between Ogden's Limited and the other English manufacturers. After the organization of the Imperial Company in October, 1901, that Company became involved in this trade conflict.

With a view to putting an end to the ruinous competition which was being carried on between the Ogden's Limited and The Imperial Company, negotiations were entered into *in England* in the Summer of 1902, between the officers of The American Company, acting on behalf of the Ogden's Limited, on the one side, and The Imperial Company on the other, looking toward the sale of the business of the Ogden's Limited to the Imperial Company. This sale was effected and the terms of sale were embodied in the Agreement annexed to the Bill of Complaint, Exhibit 1, dated September 27, 1902. Contemporaneously with this Agreement negotiations were entered into between The American Company on the one hand and the Imperial Company on the other, looking toward the transfer by each Company of its

business of exporting to foreign countries, other than the United States and Great Britain. These negotiations resulted in the formation of the British-American Company under certain terms and conditions which are set forth in Exhibit 2, annexed to the Bill of Complaint.

The Government claims that these two Agreements are illegal under the provisions of the Sherman Anti-Trust Law. We deny that there is any illegality. We assert that these Agreements were not intended to operate, and did not in fact operate to restrain trade or commerce between the various States or between the United States and foreign countries, and that they are in no respect obnoxious to the provisions of that Act, or of any law of the United States, and that the Bill was properly dismissed so far as concerns The Imperial Tobacco Company, Limited.

The Imperial Tobacco Company has no organic connection with the American Company or any of the other defendants (except the British-American Company) named in the Bill of Complaint.

The Imperial Tobacco Company never has owned and does not now own a single share of stock of the American Tobacco Company, or of any of the other defendants in this action, except the British-American Company. Aside from two of the three directors who nominally represent the American Company on the Imperial Board, no officer or director of the Imperial Company owns any stock in the American Company. The Imperial Company has no agreement, contract or arrangement of any sort with the American Company, or any of the other defendants in this action, except as appears by the two written agreements annexed to the Bill of Complaint hereinbefere referred to. The Imperial Company has no representative on the Board of Directors of the American Company or of any other of the defendants, except the British-American Company, and has no control in any way over their business affairs, or any knowledge of their business affairs other than such knowledge as is open to the public generally (See Record, Vol. II., pp. 56, 57).

Counsel for the Government state in their brief that the American Company "is a *large stockholder*" of the Imperial Company "and selects three Directors." It is true that the American Company holds a considerable amount of stock of the Imperial Company. It holds, however, but a *small minority* proportion of the stock. The amount of stock held by the American Company has *never exceeded 18 per cent. of the total* capital stock of the Imperial Company.

The *American Company has never owned and does not now own any shares of stock of The Imperial Company, except such shares of stock as it received as part payment for Ogden's Limited.* These shares of stock were not acquired by the American Company with a view to obtaining the control of the Imperial Company. So much is this the fact, that the American Company's holdings of stock in The Imperial Company have *decreased by sales of the stock* which it received from The Imperial Company. Its interest in the affairs of The Imperial Company is today less than it was at the date of the sale of Ogden's Limited. Of the shares of stock received on the sale of Ogden's Limited, the American Company has left today only £750,000 of the deferred ordinary shares of Imperial Stock, being *less than 5 per cent. of the capital stock* of that Company (pp. 56, 57, Vol. II. of Record).

As a matter of fact The American Company does not in any way control or direct the affairs of The Imperial Company.

It had, by the agreement, Exhibit 1, the right to select three directors out of the twenty-eight, to represent the interests sold by the Ogden Company, but of this number *only one director has ever attended the meetings* of the Board of the Imperial Company, so that the American Company has had *no control whatever over the affairs of that Company* (Record, Vol. II., p. 57).

Except as shown by the written agreements and except for the contractual relations created thereby The Imperial Company is absolutely distinct and separate

from The American Company and from each of the other defendants (Record, p. 58, Vol. II.).

At the time of making the written agreements of September 27, 1902, *The Imperial Company was not engaged in the business of manufacturing in the United States, nor was it shipping to the United States its manufactured products* to any considerable amount (the total export from Great Britain to the United States of all kinds of manufactured tobacco products being less than 150,000 pounds per annum, an inappreciable quantity as compared with the total amount used in this country), *nor was The American Company or any of the other defendants shipping to England manufactured tobacco products* to any considerable amount. The Protective Tariff in this country and the system of differential duties in England, to which we shall hereafter more particularly call attention, effectually prevented any profitable business being carried on as between the two countries in manufactured tobacco products (Record, Vol. II., pp. 58, 59).

The total importation of manufactured tobacco from Great Britain to the United States in 1902, which, as we have said, amounted to less than 150,000 pounds, consisted of cigarettes and smoking tobacco (there being no cigars, plug tobacco or snuff manufactured in Great Britain and exported to this country (Vol. II., pp. 723, 724; Vol. III., pp. 217, 234). The total product of cigarettes in this country in that year was 2,971,630,447 cigarettes, and of smoking tobacco 131,130,733 pounds (Appendices "F" and "H" of Government's Brief). The figures given for cigarettes are not pounds, but the number of individual cigarettes. Cigarettes run three pounds to the 1,000 (Vol. II., p. 54; Vol. IV., p. 698), so that to ascertain the amount in pounds it is necessary to multiply by 3 and divide by 1,000. As thus figured, the total cigarette output of the United States in the year 1902 is found to be 8,914,081 pounds; so that the total number of pounds of both cigarettes and smoking tobacco produced in the United States in that year was 140,044,841. It appears, therefore, that the amount of tobacco then

being exported from Great Britain to the United States was *little more than one one-thousandth part of the American product*, with which it could have come into competition.

There was, therefore, *no competition* between The Imperial Company on the one hand and The American Company or any other defendant on the other hand, except so far as concerned the business carried on by the Ogden's Limited, in England, in the interest of the American Company. It was to put an end to the ruinous *competition in England* between Ogden's Limited and the Imperial Tobacco Company that the agreements of September 27th were entered into *in England*.

The material portions of Exhibit 1 are the following:

(1) The Ogden Company agreed to *sell* and the Imperial Company agreed to *purchase* as from the 30th day of September 1902, the undertaking of the Ogden Company, including all its *real and personal property* and "*good will*, formulae and recipes for the preparation, treatment, and manufacture of tobacco, patent rights, trade-marks, brands, licenses and other exclusive rights and privileges," with certain exceptions, among which exceptions is the export business including the good will and trade-marks of such export business of the Ogden Company and the plants occupied, used or acquired for the purpose of such export business.

(2) The Ogden Company was to receive as the consideration of the sale, the value of the real and personal property of the Company as appearing by its books and the value of the good will of the business taken at the sum of £1,500,000 including patent rights, trade marks, brands, licenses and other exclusive rights and privileges and all the shares in the British Company (a subordinate Company).

3. The consideration for the sale was to be satisfied as follows:

(A) The amount payable for goodwill and other rights connected therewith, by the allotment to the Ogden Company or its nominees of fully paid-up shares in the Imperial Company (consisting as to one-half of pre-

ferred ordinary shares and as to the other half of deferred ordinary shares) to be treated as of par value;

(B) One equal third part of the balance by the allotment to the Ogden Company or its nominees of fully paid-up preference shares in the Imperial Company to be treated as of par value;

(C) As to another equal third part of the balance by the allotment to the Ogden Company or its nominees of debenture stock of the Imperial Company to be treated as of par value;

(D) The residue by the payment thereof in cash to the Ogden Company.

There was a further provision as to payment which is not material here.

5. The Imperial Company agreed to observe and perform all covenants and conditions in any lease or agreement relating to real property agreed to be sold, and to perform all contracts entered into by the Ogden Company in the ordinary course of carrying on its business, with certain exceptions.

* * * * * *

8. The purchase was to be completed on or before the 1st day of November, 1902, and the consideration was to be paid or satisfied pursuant to the provisions of the Agreement.

* * * * * *

12. The possession of the property was to be delivered by the Ogden Company to the Imperial Company on the transfer day, and in the meantime the Ogden Company was to carry on its business and maintain the same as a going concern.

* * * * * *

14. Each of the parties other than the Imperial Company agreed that it would not at any time after the transfer day, except as hereinafter expressly excepted

> " directly or indirectly carry on or be employed engaged, or concerned, or interested in the business *in the United Kingdom* of a tobacco manufacturer, or in any dealing in tobacco or its pro-

ducts therein, or sanction the use of its name in connection with any such business therein, save so far as the covenanting company, shall, as a member of the Imperial Company or as a member of any company manufacturing cigars in the United States or of any other companies formed or to be formed with the concurrence of the Imperial Company, be interested in the business thereof, or through, or in connection with the Imperial Company, as hereinafter provided."

"15. The Imperial Company similarly agrees and shall covenant with the American Company, the Continental Company, the Cigar Company and the Consolidated Company, that the Imperial Company will not at any time after the transfer day, except as hereinafter expressly excepted, either solely or jointly, with any other person or persons, company or companies, directly or indirectly, carry on or be employed, engaged, concerned, or interested in the business in the United States of a tobacco manufacturer or in any dealing in tobacco or its products therein, or sanction the use of its name in connection with any such business therein save so far as the Imperial Company shall, as a member of any other company formed or to be formed with the concurrence of the American Company, the Continental Company, the Cigar Company, or the Consolidated Company, be interested in the business thereof, and *save and except that the Imperial Company shall be at liberty to buy and treat tobacco leaf and other materials in the United States for the purpose of its business*, and save and except such business as shall be carried on through or in connection with the American Company, the Continental Company, the Cigar Company, or the Consolidated Company as hereinafter provided."

16. The Imperial Company agreed to appoint to its Board three directors nominated by the Ogden Company, who shall be re-elected at the next general meeting.

17. The export business of the Ogden Company was to be the subject of a contemporaneous agreement, providing for the transfer to a separate company of the export business from the United Kingdom, except to the United States, of the Ogden Company, the Imperial Company and the Salmon & Gluckstein, Limited, and the export business from the United States of the American Company, the Continental Company and the Cigar Company, except to the United Kingdom.

There were various other provisions of the agreement designed to carry it into effect, which it is not necessary to set forth, as no special point is made by the Government with regard thereto.

The only other clauses of the agreement which are important are the following:

> "22. The American Company, the Continental Company, the Cigar Company and the Consolidated Company, together with their directors, entering into the covenant aforesaid, are to give to the Imperial Company in the United Kingdom the full benefit of their good will and support, and, on the other hand, the Imperial Company, together with its directors, entering into the covenant aforesaid, are to give the American Company, the Continental Company and the Cigar Company in the United States the full benefit of their good will and support" * * *.
>
> "23. *This agreement is to be construed and take effect as a contract made in England, and in accordance with the law of England*, but to the intent that any of the parties may sue in its own country."

Pursuant to the provisions of this agreement the Ogden Company conveyed and transferred to the Imperial Company its real property, plant, machinery, stock in trade and materials, trade-marks, brands, formulæ and good will, exclusive of its export business, and received from the Imperial Company cash and securities as provided in the agreement. The

securities of the Imperial Company thus transferred to the Ogden Company for the benefit of the American Company as the substantial owner of the Ogden Company originally included preferred ordinary shares and deferred ordinary shares, preference shares and debenture stock. *The securities of the Imperial Company thus received amounted to about £2,650,000.* As heretofore stated *the American Company has disposed of all these securities* except £750,000 of deferred ordinary shares (Record, Vol. II, p. 56).

The contemporaneous agreement, Exhibit 2, relating to the formation of the British-American Company was an agreement between the Imperial Company of the first part; the Ogden Company of the second part; the American Company of the third part; the Continental Company of the fourth part; the American Cigar Company of the fifth part; the Consolidated Company of the sixth part and Williamson Whitehead Fuller and James Inskip on behalf of the proposed Company to be known as the British-American Tobacco Company, Limited, of the seventh part.

The agreement provides in substance that the parties of the first five parts shall sell and the British-American Company shall purchase the export business of the parties of the first five parts, and the good will appertaining thereto, including formulæ and recipes for the preparation, treatment and manufacture, as well as licenses to use patent rights, trademarks, brands, licenses and other exclusive rights and privileges for the purposes of such export business, and also including shares of stock in certain companies.

The export business is defined in the agreement to mean "the manufacture of and dealing in tobacco and its products in any country or place outside of the United Kingdom and the United States, and the manufacture of and dealing in tobacco and its products within the United Kingdom for export to any other country except the United States, and the manufacture of and dealing in tobacco and its products in the United States (except in Cuba, Porto Rico, the Hawaiian

Islands, and the Philippine Islands) for the purpose of export to any other country except the United Kingdom, and the manufacture and selling in the United Kingdom and United States, respectively, of tobacco to be supplied to ships in port for the purpose of ships' stores."

The price to be paid for the good will, including trade-marks, brands, licenses and corporate shares in other companies was fixed at £2,820,000, of which two-thirds or £1,880,000 were payable to the Ogden Company, the American Company, the Continental Company, the Cigar Company and the Consolidated Company in such proportions as they should agree, and one-third or £940,000 were payable to the Imperial Company, said prices to be satisfied by the allotment to the parties entitled thereto of fully paid-up ordinary shares of the British-American Company to be treated as of par value.

The sale and purchase were to take effect as to the Ogden Company on the 30th day of September, 1902, and as to the remaining Companies on the 31st of October, 1902.

It was further provided that in addition to the ordinary shares agreed to be allotted in payment of the purchase money for the good will and intangible assets of the various Companies in connection with the export business the Imperial Company should take and pay cash for £300,000 additional of ordinary shares and the American Company and the other Companies should take and pay cash for £600,000 additional of ordinary shares in the British-American Company, Limited, which shares should be allotted to such parties at once.

It was further agreed that the Imperial Company and the Ogden Company would respectively *sell* to the British-American Company "their several lands, buildings and hereditaments used as export factories, and the plant and equipment and stock in trade at the date of transfer forming a part of the said export business or undertakings, and the American Company, the Continental Company and the Cigar

Company will *sell* to the British-American Company factories for export business, and the plant and equipment and stock in trade at the date of transfer forming a part of the said export businesses or undertakings."

It was further agreed that the factories of the Imperial Company to be transferred should include the export factory of the Imperial Company formerly belonging to W. D. & H. O. Wills, Limited, at Ashton Gate, Bristol, the leasehold export factory formerly belonging to Messrs. Lambert & Butler, Limited, in London, and the two export factories formerly belonging to the Richmond Cavendish Company, Limited, at Liverpool, and the cigarette factory of the Imperial Company, formerly belonging to W. D. & H. O. Wills, Limited, at Sydney, Australia. The export factories of the other parties were to include the bonded or export factory of the Ogden Company in Cornwallis street, Liverpool, and the factory at Sydney, and such other suitable factories as should be designated by the American Company, the Continental Company and the Cigar Company, "so that the price thereof, with their plant and equipment, as hereinafter fixed, shall not exceed the aggregate price of the factories, land and cottages, with their land and equipment, to be *sold* by the Imperial Company, as before stated."

It was further provided that "all the said factories and the plant and equipment used in connection with the same are to be taken at the value now standing in the books of the respective vendors in cash."

It was further agreed that as part of the export business and good will to be sold by the Imperial Company to the British-American Company, the export business of Salmon & Gluckstein, Limited, other than lands, buildings or hereditaments, and the interest of the Imperial Company in a factory at Shanghai recently purchased by it and in the American Cigarette Company of Shanghai should be included.

It was further provided: "6. The British-American Company shall have the right to use in its export busi-

ness, as hereinbefore defined, any brands and trade-marks now owned or hereafter acquired or adopted by any of the parties hereto of the first six parts."

Various other provisions with regard to details are set forth in the agreement.

It is further provided that the purchases shall be completed on or before the first day of January, 1903, in London and the consideration for the same shall be paid or satisfied subject to the provisions of this agreement.

Each of the parties to the agreement of transfer covenants with the British-American Company that it will not at any time after its transfer day carry on or be employed or interested in export business as defined in this agreement, except as it may be interested as a member of the British-American Company, or of any company formed or to be formed with the concurrence of the British-American Company, and there is a corresponding covenant by the British-American Company that it will not carry on or be engaged or interested in the business of a tobacco manufactory or in any dealing in tobacco or its products, except in the manner and within the limits contemplated and authorized by this agreement.

It is further provided: "20. *This agreement is to be construed and take effect as a contract made in England and in accordance with the law of England.*"

The provisions of this agreement were carried out. The British-American Company was duly organized under the laws of England, and the transfers called for by the agreement were made by the various parties to the agreement. There were issued to the Imperial Company £300,000 of ordinary shares of the British-American Company, Limited, and there were issued to the other Companies £600,000 of ordinary shares of the British-American Company, Limited, for which cash was paid to the British-American Company, Limited, in accordance with Clause 3 of the agreement by the various Companies. Out of the cash thus provided the British-American Company paid for the factories and plants transferred to it by the various Companies. *The*

amount paid to the Imperial Tobacco Company on actual inventory for its various factories, plants, machinery and material and tangible assets was £607,694, 11s. 11d. amounting to over $3,000,000 (Record, Vol. IV., pp. 738–9). In addition, the Imperial Company parted with its good will and labels, the right to use the trade-marks and labels in connection with its export business and also parted with certain stock of certain Companies that were engaged in the export business, and in return for these intangible assets, good will, labels and stock it received an amount of capital stock of the British-American Company as provided by the agreements, namely, £940,000 (Record, Vol. IV., p. 739). The result of the transactions was that the American Company and its allied Companies received two-thirds of the capital stock of the British-American Company and the Imperial Company received one-third.

All these transactions took place in England.

Since the making of these agreements the business of the British-American Company has been carried on in accordance with said agreements. So far as concerns the export business from the United States to foreign countries, other than Great Britain, *the operations of the British-American Company, so far from restraining or diminishing trade, have resulted in a large increase.* More leaf and more manufacured tobacco is exported from the United States to-day than was exported before 1902 by the American Companies and the Imperial Company combined.

The price of leaf tobacco and the demand for leaf tobacco in the United States have increased since 1902.

Counsel for the Government state in their brief that " a strong but unsuccessful effort has been made to establish the existence of real competition between it (the Imperial Company) and the American Company." We submit that the " effort " has not only been " strong " but " successful " and that the evidence overwhelmingly establishes the existence of *real competition* between the Imperial and the American Companies in the purchase of leaf tobacco.

The agreement itself (Exhibit 1) between the Imperial and the American Companies expressly reserves the right of the Imperial Company "*to buy and treat tobacco leaf*" in the United States (see Paragraph 15 of the Agreement).

Every witness examined in the suit (witnesses for the Government as well as witnesses for the defense) testifies that the Imperial Company at all times from 1902 to the present time, purchased through its own agencies and in direct competition with the American Company, and that there was no agreement or understanding, express or implied, between the two Companies or their agencies to refrain from competition or to agree on prices of leaf tobacco.

Counsel for the Government in their brief (p. 171) state :

> " When this Company (the Imperial Company) and the American were in real competition in 1902, prices in the Carolinas and Virginia were very high (R. IV., 241, 242, 264, 265 and 271) notwithstanding the large crop ; in 1903 they fell below cost of production. The average for 1902 was not again reached until 1907, notwithstanding the declining production (R. IV., 269) ".

The facts as shown by the testimony are quite at variance with the implications of this statement. The references in the brief to the record are to the testimony of Mr. Carlton, the agent of the Imperial Company. It appears from the testimony of Mr. Carlton and from the tables introduced in evidence that there was a slump in the price of tobacco in 1903, which was partly accounted for by overproduction and partly by a reaction from unfair and ruinous competition of the preceding year. The average price in 1902 was 9.98 cents. It fell in 1903 to 6.31. It does not appear from the evidence what the cost of production was. In 1904, however, the price rose to 8.59 and from that time the rise was steady until in 1907 it had risen to 10.30. (See p. 269).

So far, however, was there from being an absence of competition that it appears that during this period the Imperial Company paid in 1902, 10.41; in 1903, 7.19; in 1904, 10.20; in 1905, 8.76; in 1906, 10.38 and in 1907, 11.44, being in excess for each year of the prices paid by all other purchasers.

The Exhibit annexed to brief of counsel for the Government, Appendix C, is quite at variance with the statement of counsel in their brief. That Exhibit shows that the average farm price per pound was as follows: 1900, 6.6 cents; 1901, 7.1 cents; 1902, 7 cents; 1903, 6.8 cents; 1904, 8.1 cents; 1905, 8.5 cents; 1906, 10 cents; 1907, 10.2 cents; 1908, 10.3 cents. (See, also, Brief, p. 177.)

We shall discuss the evidence more at length under the subsequent points.

On these facts we claim—

I. The agreements of September 27, 1902 were not in violation of the so-called Sherman Anti-Trust Act.

II. So far as an intent to violate the provisions of that law might be a matter of inference from some of the provisions of the agreements, the oral testimony shows that the agreements did not and could not, under the existing circumstances, operate to restrain trade or create a monopoly, and therefore, could not and did not operate as a violation of the Sherman Anti-Trust Act.

III. So far as the Bill of Complaint herein avers that there was any restraint of competition in the purchase of leaf tobacco, either by reason of the written agreement, Exhibit 1, or by reason of any other agreement, arrangement or understanding, or any practice outside of the written agreement, the evidence overwhelmingly disproves any such claim.

IV. No decree can be made in this suit as against the Imperial Company which will be just and equitable.

V. Neither Exhibit 1 nor Exhibit 2 violates the spirit of the statute by raising the price to consumers, lowering the price to producers or preventing competition.

PRELIMINARY POINT.

Before taking up the above propositions in their order, we desire to call the attention of the Court to the fundamental proposition which is to be borne in mind in considering the legality or illegality of the agreements made with the Imperial Company. This fundamental proposition is that *the Sherman Anti-Trust Act does not, and cannot have, and was not intended to have any extra-territorial effect.* It is based on the Commerce Clause of the United States Constitution, namely, the clause authorizing Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes" (Constitution, Art. I., Sec. 8, Subdiv. 3).

Section 1 of the Sherman Anti-Trust Act of July 2, 1890, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the Court."

It is perfectly clear that this Act is not intended to and cannot operate to render illegal a contract which is in restraint of trade or commerce within the United

Kingdom of Great Britain and Ireland, or in restraint of trade and commerce between that Kingdom and countries other than the United States of America, and it is equally clear that if the statute should be interpreted as undertaking to declare illegal such contracts it would be unconstitutional and void.

The fact that a contract operating to restrain trade or commerce within the United Kingdom of Great Britain and Ireland, or between that kingdom and other countries than the United States of America, is entered into by American corporations or American citizens, does not bring the contract within the purview of the Act of Congress. It is only when a contract affects "commerce with foreign nations [that is to say, commerce between the United States and foreign nations] and among the several States and with the Indian tribes" that Congress has any constitutional power "to regulate" the subject matter of such a contract.

This fundamental proposition seems to us so self-evident as not to admit of discussion or argument.

If there ever was any question about it, the case of *American Banana Company vs. United Fruit Company*, recently decided by this Court (213 U. S., 347) disposes of the question. In that case it was held that "the prohibitions of the Sherman Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209, do not extend to acts done in foreign countries even though done by citizens of the United States and injuriously affecting other citizens of the United States".

The Court say, per Mr. Justice HOLMES (p. 355):

> "It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other States. It is surprising to hear it argued that they were governed by the Act of Congress. * * * But the general and almost universal rule is that the character of an act as lawful or

unlawful must be determined wholly by the law of the country where the act is done. * * * For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions, rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent * * * Words having universal scope, such as 'every contract in restraint of trade' 'every person who shall monopolize' etc. will be taken, as matter of course, to mean everyone subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute, the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."

The statute of the United States, on which the Government relies, having no extra territorial efficacy it follows that the contracts made in England must stand or fall by the common law, so far, at least, as regards their operation upon property located in England or trade carried on in England or between England and countries other than the United States.

Counsel for the Government contend that "there is no proper evidence in the record to prove the law of England," and insist that the courts of one country cannot take cognizance of the law of another without proof. It was not necessary for us to prove that the agreements in question were valid under the law of England. Their validity will be presumed, unless the contrary is shown. In the absence of proof, the presumption is in favor of the legality of the agreement.

Even, however, if it had been incumbent upon us to establish the proposition that the contracts were lawful in England, we had a right to rely upon the common law principles of which the Courts of this country will take judicial notice.

Moreover, even if the contracts were invalid at common law, that circumstance would not entitle the Government to a decree in this suit, since this is a suit brought not to restrain the enforcement of the contracts because void at common law, but to restrain the enforcement of the contracts as void under the statute. This suit must, therefore, stand or fall upon the construction of the Sherman Act, and that Act, as we have seen, has no extra territorial effect.

We do not, of course, dispute the proposition insisted on by the Government that a foreign corporation, doing business within the jurisdiction of the United States, has no license or immunity to violate the policy or laws of the United States, and we do not claim that the mere fact that the agreements in question were actually made in a foreign country affords any justification for violating the laws of this country. Our point is, that, so far as the agreements concern transfers of property in England or restraint of competition *in England* or between *England* and *foreign countries*, the Sherman Act has no application.

On the other hand, so far as concerns business between this country and England or other foreign countries, or between the various States, the proof shows that there is *no actnal* restraint of trade, and *no intent to restrain trade* within the meaning of the Sherman Act, as we shall hereafter point out, more at length.

[In the following discussion, we shall designate for the purposes of brevity as the American Company, the corporation known as The American Tobacco Company and its allied Companies.]

We shall not discuss in this brief the general questions as to the true construction and application of the Sherman Act and as to what classes of contracts

do and what classes of contracts do not come within the prohibition of that Act as being contracts in "restraint of trade" or tending to create a "monopoly." Nor shall we discuss the question as to whether the American Tobacco Company or any of its constituent or allied companies has or has not violated the statute. These questions are both interesting and important, but they have been so fully and so ably discussed by counsel for the American Tobacco Company in their brief that further discussion by us is superfluous. Suffice it to say that we concur in their views as to the legality of the steps by which these various companies have acquired their property and developed their business and as to the legality of the business now carried on by them.

So far, however, as concerns The Imperial Tobacco Company, it is not necessary for us to go into these questions. All that is necessary for us to do is to show that the two contracts to which The Imperial Company is a party are not in violation of the Sherman Act.

I.

The agreements of September 27, 1902, were not in violation of the so-called Sherman Anti-Trust Act.

(1) The Agreement Exhibit 1 was not in violation of the Act.

The primary and principal object of this Agreement was the sale of the property of the Ogden's Limited *an English corporation*, carrying on the business of manufacturing and selling tobacco products *in England*, to The Imperial Company of Great Britain and Ireland, Limited, *another English corporation*, carrying on the business of manufacturing and selling tobacco products *in England*.

In order to carry out and effectuate this sale mutual covenants were entered into between The Imperial Company on the one hand, and The American Company on the other hand, intended to effectuate a purchase of the good will of the Ogden Company from the American Company. These covenants, so far as they are in restraint of trade in England, are, of course, outside of the scope of the Sherman Act under the general principles above stated. So far as they operate to restrain trade between England and this country, or between the various States of this country, they are merely incidental to the sale itself and are not within the intent and meaning of the Sherman Act under the decisions, to which we shall hereafter call attention. The evidence shows that there was, in fact, no restraint of trade resulting from this contract, as between England and this country, or as between the various states of this country, since the differentials imposed in England upon tobacco products imported from this country, and the protective tariff imposed by Congress upon tobacco products imported into this country, made commerce in tobacco products between the two countries so unprofitable as to be practically impossible.

It is charged in the Bill of Complaint or Petition that The Imperial Company had established a monopoly of the tobacco business in Great Britain. Even if this charge were substantiated by the proof, it would be of no consequence in this case. It cannot be seriously contended that Congress intended to prohibit monopoly of business in any foreign country, or that it had any constitutional right to do so (see Preliminary Point, *supra*).

There is, however, no basis for the charge that the formation of The Imperial Company, and the sale of the Ogden's Limited to The Imperial Company, created a monopoly in the business of manufacturing or selling tobacco products in Great Britain. The fact is otherwise.

The Answer of the defendant The Imperial Tobacco Company expressly denies this charge. The Answer sets forth—

"This defendant denies that it was formed for the purpose of destroying competition or that the effect of its formation has been, to destroy competition among the English manufacturers of tobacco, or that it has at all times or at any time since its formation controlled or monopolized the manufacture of or trade or commerce in such products or the leaf tobacco necessary therefor, with or within the United Kingdom, and this defendant avers that there is and at all times has been keen competition in the United Kingdom between it and other manufacturers." (Answer of The Imperial Company, fols. 27 to 29.)

The only attempt on the part of the Government to establish the allegation of monopoly in England was by a question put to Mr. Harris while on the witness stand as a witness for the Government, and his answer denied any knowledge that The Imperial Company had or has any monopoly (Record, Vol. II., pp. 23, 24).

Assuming, however, as heretofore postulated, that the sale of one English Company to another English Company of a manufacturing establishment and business in England cannot be brought within the prohibition of the Sherman Act, even though such sale results in a monopoly, and assuming that the covenant by the American Company and its allied Companies not to manufacture or sell in Great Britain, was not a violation of the Sherman Act, because it had to do entirely with trade in a foreign country, we come to the only question remaining, namely, whether the corresponding covenants by The Imperial Company not to manufacture or sell in this country are within the prohibition of the Sherman Act. We respectfully submit that there is no substantial basis for such a claim. These covenants by The Imperial Company are only the necessary and proper equivalents of the covenants by The American Company on behalf of the Ogden's Limited and are but the necessary and proper method of effectuating and giving value to the transfer by The Imperial Company to the American Company

of the right to use in America the brands, labels and trademarks of The Imperial Company.

We shall discuss hereafter the practical results of these covenants and shall show that there was, in fact, no restraint of trade between the two countries or between the several States by reason thereof. We submit, however, that the covenants themselves were not violations of the Sherman Act, inasmuch as they were only incidental to the carrying out and effectuating of a sale of good will, which sale was itself proper and lawful.

(a) Notwithstanding the very broad language used by this Court in construing the Sherman Act, we submit that the Court has recognized that *there are certain contracts in partial restraint of trade which would not be invalid at common law and which do not come within the prohibition of the Sherman Act.*

This principle has been recognized in the very cases in which this Court has held that all contracts in restraint of trade, whether reasonable or unreasonable, are in violation of the Sherman Act.

Thus, in the case of *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290, it is said by Mr. Justice PECKHAM:

> "The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

Again, he says, at page 329:

> "*A contract which is the mere accompaniment of the sale* of the property, and thus entered into

for the purpose of enhancing the price at which the vendor sells it, which in effect is *collateral to such sale*, and where *the main purpose* of the whole contract is *accomplished by such sale*, might *not* be included *within the letter or spirit of the statute* in question."

In *Northern Securities Company vs. U. S., 193 U. S., 197*, Mr. Justice BREWER says at page 361:

"*Congress did not intend to reach and destroy those minor contracts in partial restraint of trade* which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy."

In *Cincinnati Packet Company vs. Bay, 200 U. S., 179*, it is said by Mr. Justice HOLMES at page 184:

"It is argued, to be sure, that the last mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words 'it is also agreed as a part of the consideration of this agreement.' *By these words the covenant not to do business* between Cincinnati and Portsmouth for five years is *imported into the sale* of the ships, and made one of the conventional inducements of the purchase. *The price is paid not for the vessels alone but for the vessels with the covenant.* So, still more clearly, the parallel installments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale.

"Presumably all that there was to sell, beside certain instruments of competition, was the com-

petition itself, and the purchasers did not want the vendors' names.

"This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been *no intimation from any one*, we believe, *that such a contract, made as part of the sale of a business* and not as a device to control commerce, *would fall within the act.* On the contrary, it has been *suggested repeatedly* that *such a contract is not within the letter or spirit of the statute (United States v. Trans-Missouri Freight Association*, 166 U. S., 290, 329, *United States v. Joint Traffic Association*, 171 U. S., 505, 568), and it was so decided in the case of a patent. *Bement v. National Harrow Co.*, 186 U. S., 70, 92. It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed."

The doctrine laid down in *U. S. vs. E. C. Knight Co.*, 156 U. S., 1, has never been overruled, although it has been distinguished by the later cases where the facts as established showed a different state of facts and showed an agreement or combination intended to interfere with trade or commerce between the States, It still remains true, as stated in the *Knight* case, by Chief-Justice FULLER, at page 16:

"It was in the light of well-settled principles that the act of July 2, 1890, was framed. *Congress did not attempt* thereby to assert the power to deal with monopoly directly as such; or to *limit and*

restrict the rights of corporations created by the States or the citizens of the States *in the acquisition, control, or disposition of property;* or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; *or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted.*"

In *Brett vs. Ebel*, 29 N. Y. App. Div., 256, a party sold "all his interest and good-will in the business of freighting vessels for Port au Prince and said Brett's Line, Haiti Packets," and for a time mentioned agreed not to solicit freights nor do any business with Port au Prince, in consideration of a certain sum to be paid to him. *Held*, the contract in question involved no unreasonable restraint of trade, nor was it invalid under the Federal Anti-Trust Act, as the restraint in question was *merely ancillary to a lawful contract* and was designed only to prevent the vendor from competing with the purchaser within a limited area.

BARRETT, J., says, at page 259: "It was held by the Supreme Court of the United States in the case of *U. S. vs. Trans-Missouri Freight Association* (166 U. S., 290) that these prohibitory provisions apply to all contracts in restraint of interstate or foreign trade or commerce, without exception or limitation; and that they are not confined to those in which the restraint is unreasonable. The opinion in that case, however, must be read in the light of its facts. The contract there was not founded upon or connected with any sale of property or good will. Thus the restraint was not ancillary to any lawful contract. The particular contract there under consideration was one which was entered into between competing railroads for the purpose of thereby affecting traffic rates for the transportation of persons and property. We find nothing in the opinion to warrant the extreme view taken by the defendants here. On the contrary, we find language suggestive of the opposite and certainly the more reasonable view.

" 'A contract,' said Judge PECKHAM (at p. 329), 'which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question.'

" It should be observed that the act which was there under consideration was entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.' The word 'contract' in the 1st section is joined with the words 'combination' and 'conspiracy,' thus plainly indicating the mischief aimed at by Congress. The history of that act emphasizes this view. It was clearly aimed at the so-called 'trusts' or monopolies now so familiar in this country, whose main object was the restraint of trade. The intention was undoubtedly to declare every contract illegal which was in the line of these evils. *But it certainly was not intended to prohibit a man from selling his business in the ordinary way and from thereupon obtaining the full value thereof through the instrumentality of an incidental covenant not to compete with the purchaser within some limited area.*"

The question of the legality of the contract under the Sherman Act was directly raised in that suit which was an action upon the contract in which the defendant pleaded illegality under the Act of Congress. This decision is therefore in no sense a *dictum*.

In *Brooklyn Distilling Co. vs. Standard Distilling Co.*, 120 N. Y. App. Div., 237, it is said, referring to the New York statute against restraint of trade and monopolies, by Mr. Justice MCLAUGHLIN at page 239:

> " The statute does not prevent one selling or leasing property, nor does it prevent one buying or leasing property to prevent competition (*Diamond Match Co. v. Roeber*, 106 N. Y., 473; *Leslie v. Lorillard*, 110 *id.*, 519; *Tode vs. Gross*, 127 *id.*, 480). It is designed to prevent the owners or

controllers of property entering into a combination to regulate production and maintain prices for their mutual benefit according to their respective interests.

"The court in *Cummings v. Union Blue Stone Co.* (164 N. Y., 401) clearly pointed out the purpose of the statute and the kind of a contract which, if made, would be void under it, but in doing so it took occasion to say: 'It may be conceded that the law, as now understood, restrains no one from selling his property, nor does it compel any one to continue a business which he can sell or finds it to his interest to abandon; much less to continue it for any time or in any particular manner or place. * * * Contracts between individuals to that effect are not in general restraint of trade.' And substantially the same statement was made in *Wood v. Whitehead Brothers Co.* (165 N. Y., 545), which was cited with approval in *New York Bank Note Co. v. Hamilton Bank Note Co.* (180 *id*, 280)."

In *Lanyon vs. Garden City Sand Co.*, 223 Ill., 616; 79 N. E., 313, a contract between one Lanyon of the first part, one Heber and one Bonebrake, of the second part, and Garden City Sand Co., of the third part, and Hillsdale Fire Brick and Clay Company, of the fourth part, and one J. B. Warner and one Maria Warner, of the fifth part, provided as follows: Heber and Bonebrake, of the second part, to mine, grind and operate for Lanyon, of the first part, his fire clay grinding plant located at Jonesdale Switch, Indiana. The first and second parties agreed to deliver at said place first-class marketable fire clay at a certain price, in such quantities and at such times as the third, fourth and fifth parties might order. The first party agreed to erect and equip a new plant at his own expense for the grinding of the clay, and the second parties were to give their individual personal attention to the operation of the plant. The first party also agreed *not*

to operate any other fire clay grinding plant on any land that he owned or controlled in the State of Indiana, and the first and second parties agreed *not to sell fire clay* to any other persons than the third, fourth and fifth parties during the time of the contract. The second, third, fourth and fifth parties agreed to *cease to operate a certain plant* located at Russell Switch, Indiana, but in case the new plant could not supply the demand, the old plant at Russell Switch was to be reopened. The third, fourth and fifth parties agreed that they *would not buy fire clay produced in the State of Indiana, except such as was produced by the parties to the contract*, and they would make the greatest possible effort to sell all the fire clay so produced, and would jointly order and pay for not less than an average of 40 tons for every working day during the period of the contract, for which they were to pay 77½ cents per ton, and not enter into any combination or trust for the purpose of limiting the output of either plant.

It was held by the Supreme Court of Illinois, affirming the judgment of the Appellate Court, that this contract was *not in violation of the Federal Anti-Trust Act*, and that plaintiff was entitled to relief by way of injunction to restrain the violation of the covenants of the contract.

The Court say, per WILKIN, J.:

> "The first question discussed in the argument of counsel is whether the agreement of September 10, 1901, is a valid contract, as was held by the Appellate Court, or is in restraint of trade and violative of the anti-trust law of this State or of the United States, as found by the Superior Court, and therefore void. The appellants, in support of the latter contention, insist mainly upon that part of the contract by which the first party agrees not to operate any other fire clay grinding plant on any land owned or controlled by him in the State of Indiana, or to sell to any other person during the time of the contract, and

in which the third, fourth, and fifth parties agree not to buy fire clay produced in that state other than from the first and second parties."

The Court then proceeds to quote the language of the Federal statute and of the State statute, and proceeds:

"The object of these statutes is to prohibit the formation of trusts and combinations and remove all obstructions in restraint of trade and free competition. It was not the purpose of either law to hinder or prohibit contracts on the part of corporations or individuals made to foster or increase trade or business. But a contract may incidentally restrain competition or trade, without violating the statutes, if its chief purpose is to promote and increase the business of those who enter into it. * * * Such contracts usually grow out of sales of property with the good will of a business, profession, partnership, etc., but they are not confined to such contracts. Speaking of the Federal statutes in the well-considered case of *Whitwell v. Continental Tobacco Co.*, 125 Fed., 454, C. C. A., 290, 64 L. R. A., 689, it is said: 'If it (the contract) promotes or accidentally restrains competition, while its main purpose and chief effect are to foster the trade and increase the business of those who made and operated it, then it is not a contract, combination, or conspiracy in restraint of trade within the true meaning of this act, and is not subject to its denunciation.'"

[This quotation from the Whitwell case is verbally inaccurate. The exact language of the Court is: "If on the other hand, it promotes or but *incidentally or indirectly restricts competition*, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is *not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is*

not subject to its denunciation." See opinion of SANBORN, Cir. J., 125 Fed. Rep., 458.]

"Naturally the several interests of these parties drew them together and prompted them to make the contract in question. *It was of mutual benefit and advantage to each of them.* Without it each party would labor at a disadvantage and fail to realize the full limit of his or its resources and opportunities. The contract seems just and reasonable in the light of these facts. *The corporations might reasonably refuse to enter into the contract or purchase the 40 tons of fire clay daily, unless they could be protected against the selling of the same product by Lanyon in competition with them.* * * * Considering the contract as a whole in the light of the facts surrounding the parties, we are of the opinion that it is not invalid, that the object of it was to foster and establish a legitimate business, and, although to a limited extent it may have restrained competition, there was not such a limitation or restriction as should defeat its validity under the law."

To same effect, see as to construction of the "Sherman Anti-Trust" Law;

Bancroft & Rich vs. Union Embossing Co., 72 N. H., 402; 57 Atl., 97.

(*b*) At common law any contract, whereby one of the parties agrees to refrain from competition with the other party, was technically known as a "contract in restraint of trade." *Such contracts, however, were not necessarily unlawful. A contract in "partial" restraint of trade was lawful.* A contract in "general" restraint of trade was unlawful. We submit that it must be held that *contracts, although in partial restraint of trade, if valid at common law and if not a cover for a combination or conspiracy to raise prices or to prevent general competition, are not invalid under the Sherman Act.* We proceed, therefore, to inquire what have been the rulings of the Courts in England

and in this country on the subject of covenants made in connection with the sale of a business property and its good will.

By a covenant in "general" restraint of trade, as formerly defined by the Courts, was meant a covenant by a vendor to refrain from competition with the vendee for an unlimited period of time or throughout an unlimited territory. It is now settled, however, that a covenant by a vendor to refrain from competition, though unlimited in time or territory, is not necessarily illegal; the question in each case is whether the covenant is reasonably necessary to protect the vendee in the enjoyment of the good will of the business sold to him.

Thus in *Diamond Match Co. vs. Roeber*, 106 N. Y., 473, the covenant was for the period of 99 years, which was, of course, equivalent to a perpetual covenant, the defendant, the covenantor, being an individual. It was precisely the same as an agreement for the remainder of the defendant's life, just as, in the case at bar, the covenants are for the life-time of the corporations. In the *Diamond Match Company* case, defendant wae engaged in the manufacture in New York and sale throughout the States and Territories, of friction matches. He sold his factory and goodwill to a corporation engaged in the same manufacture in Connecticut, Delaware and Illinois, selling its manufactures throughout the country. The bill of sale contained a covenant not to engage within 99 years in such manufacture or sale, except in the service of the purchasing company, within any of the States or Territories, except Nevada and Montana. The Court takes advantage of this exception to hold that the restraint was partial and not general, declining to rule that the exception of Nevada and Montana was "colorable merely."

The *dicta* of the Court, however, clearly indicate that, had it been necessary to the decision, the Court would have sustained a covenant covering the whole country, if such a covenant were necessary in order to protect the interest to be protected.

The Court reviews the decisions up to date and holds that "while the early doctrine of the common law that contracts in general restraint of trade are void, without regard to circumstances, has not been fully abrogated, it has been much weakened and modified." The Court says, per ANDREWS, J., at page 482: "When the restraint is general, but at the same time is *co-extensive only with the interest to be protected and with the benefit meant to be conferred*, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. * * * *If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells?*"

On page 483, it is further said, per ANDREWS, J.:

> "It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint where the trade is local, are

subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee.

"We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production and to enhance prices, are or may be unlawful, but they stand on a different footing. We cite some of the cases showing the tendency of recent judicial opinion on the general subject. Whittaker v. Howe, 3 Beav., 383; Jones v. Lees, 1 Hurl. & N., 189; Rousillon v. Rousillon, *supra* (14 L. R. Ch., Div., 351); Leather Co. v. Lorsont, 9 Eq. Cas. L. R., 345; Collins v. Locke, 4 App. Cas. L. R., 674; Oregon Steam Co. v. Winsor, 20 Wall., 64; Morse v. Morse, 103 Mass., 73. In Whittaker v. Howe, a contract made by a solicitor not to practice as a solicitor 'in any part of Great Britain', was held valid. In Rousillon v. Rousillon, a general contract not to engage in the sale of champagne without limit as to space, was enforced as being under the circumstances a reasonable contract. In Jones v. Lees, a covenant by the defendant, a licensee under a patent, that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them was held valid. BRAMWELL, J., said: 'It is objected that the restraint extends to all England, but so does the privilege.' In Oregon Steam Co. v. Winsor, the court enforced a covenant by the defendant, made on the purchase of a steamship, that it should not be run or employed in the freight

or passenger business upon any waters in the State of California for the period of ten years.

"In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed, has, to a considerable extent at least, by the change of circumstances, been removed."

On page 484 the Court unequivocally hold that the circumstance that the covenant is a perpetual one does not make it invalid. "*It is practically unlimited as to time, but this under the authorities, is not an objection, if the contract is otherwise good.*"

Since the decision of the Court of Appeals of New York in the *Diamond Match Case* there has been a succession of cases in that Court holding in effect that a covenant unrestricted in time and territory is valid if necessary to the protection of the property rights or good-will sold. This doctrine has been extended and applied to other cases than a sale of a business property with its good-will.

Hodge vs. Sloane, 107 N. Y., 244, was a case involving a restrictive covenant in a deed of land by which the grantee bound himself not to sell any sand off the premises, the object being to protect the grantor from competition in the business of selling building sand from his remaining property.

Leslie vs. Lorillard et al., 110 N. Y., 519, was a case where an agreement was held to be valid between two steamship companies, whereby one of the companies, in consideration of a monthly payment to be made to it, agreed to discontinue running vessels on a particular route, the Court drawing a distinction between an agreement which merely removes a business rival and an agreement which undertakes to exclude all competition in business.

Tode vs. Gross, 127 N. Y., 480, was a case where the owner of a cheese factory was engaged in manufactur-

ing several varieties of cheese by a secret process and entered into an agreement to sell her factory, together with the good-will, custom, trade-marks and names used in and belonging to said business, and covenanted to communicate the secret of the manufacture to the vendees and to refrain from communicating said secret to anyone else, and after a certain date refrain from making, manufacturing or vending said cheese for five years. The Court, per VANN, J. (page 485), held :

> "The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agreement is *not opposed to public policy, even if the restriction was unlimited as to both time and territory.*"

Matthews vs. Associated Press of the State of N. Y., 136 N. Y., 333, was a case where a by-law of the defendant corporation was held valid. It prohibited its members from receiving or publishing "the regular news dispatches of any other news association covering a like territory and organized for a like purpose." The Court held that the by-law was not objectionable as tending to restrict trade and competition or to create a monopoly.

Oakes vs. Cattaraugus Water Co., 143 N. Y., 430, was a case which held that where the business of a private corporation or individual is threatened with competition, a contract with a competitor that he shall abandon his enterprise and take employment at an agreed compensation with such corporation or individual is not against public policy.

Wood vs. Whitehead Brothers Co., 165 N. Y., 545, was a case where a person who was engaged in the business of buying and selling a commodity, but with neither a

business plant nor stock, entered into a contract with a corporation whereby he agreed for a certain compensation to discontinue his business and to turn over to it all orders which he then had or might thereafter receive for the commodity in question, and the Court held the agreement to be valid and not an unreasonable restraint of trade. The Court say, at page 551, per GRAY, J.:

> "*But contracts between parties, which have for their object the removal of a rival and competitor in a business, are not to be regarded as contracts in restraint of trade. They do not close the field of competition, except to the particular party to be affected.*"

N. Y. Bank Note Co. vs. Hamilton B. N. Co., 180 N. Y., 280, was a case where a corporation engaged in manufacturing presses for printing, numbering and perforating strip tickets entered into a contract with a Printing Company, by which all future sales of the presses should be made to and through the latter Company, which should have the right to lease the presses, the prices to be collected by the Printing Company and paid by it to the Press Company. The latter Company further agreed not to attach the numbering and perforating devices to any press previously manufactured and sold, the object of the contract being to prevent any competitor of the Printing Company from obtaining or using any press built by the Press Company with the numbering and perforating attachments or which could be used for printing strip tickets of form, design or purpose similar to those printed or that might be printed by the Printing Company, and the Court held the contract not to be in restraint of trade, notwithstanding the fact that the contract was restricted to the sale of presses to the Printing Company, and that a separate consideration was paid for the covenant of restriction.

The authorities in the other States of the Union are to the same effect. The law on the subject is fully

reviewed in the opinion of the Court in *Anchor Electric Co. vs. Hawkes*, 171 Mass., 101. That case was originally heard before Mr. Justice HOLMES, who granted an injunction and reported the case to the full Court who sustained his decision and granted a decree for plaintiffs. It appeared in that case that there was a written agreement between four corporations, whereby the assets and good-will of three of the corporations were transferred to the fourth, and the three agreed to discontinue business. The Court examined the previous decisions and approved the doctrine laid down in *Diamond Match Co. vs. Roeber*, 106 N. Y., 473, and *Tode vs. Gross*, 127 N. Y., 480, *supra*, and the cases in other States to the same effect. The Court also approved of the decision of the House of Lords in *Nordenfelt vs. Maxim, etc., Co.*, L. R. (1894), App. Cas., 535, cited *infra*.

In *United Shoe Machinery Co. vs. Kimball*, 193 Mass., 351, the subject is again considered by the Supreme Court of Massachusetts and the authorities reviewed and the rule stated that in certain cases a covenant may be valid " which is unlimited both in time and space." The Court say :

> " The value of a business with its good-will may be enhanced to a purchaser by the fact that its competition is detrimental to a business conducted by him. A considerable part of the price paid may represent the value to the purchaser of relief from the interference of the vendor as a competitor. The mere fact that a contract looks to the withdrawal of the competition of one of the parties to it does not render the contract invalid.'

The most recent decisions in the State Courts in which covenants to refrain from competition have been held reasonable and lawful are :

Freudenthal vs. Espey (Col. Supreme Ct. May 3, 1909), 102 Pac., 280.

Louisville Board of Underwriters vs. Johnson (Ct. of App., Ky., May 14, 1909), 119 S. W., 152.

Wolf vs. Duluth Board of Trade (Supreme Ct., Minn., June 4, 1909), 121 N. W., 395.
Siegel vs. Marcus (Supreme Ct., N. Dak., Jan. 7, 1909), 119 N. W., 358.
Buckhout vs. Witwer (Supreme Ct., Mich., July 6, 1909), 122 N. W., 184.
Bloom vs. Home Ins. Agency (Supreme Ct., Ark., July 12, 1909), 121 S. W., 293.

The decisions in the Federal Courts are to the same effect.

In *Oregon Steam Navigation Co. vs. Winsor*, 20 Wall., 64, the sale of a steamer subject to a stipulation with the purchaser not to run or employ, or suffer to be run or employed, the said steamer in the waters of the State of California for ten years from the date of sale, was held to be not void as in restraint of trade.

In *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396, 409, it is said by Mr. Chief Justice FULLER:

> "The decision in *Mitchel v. Reynolds*, 1 P. Wms., 181; S. C. Smith's Leading Cases, Vol. I., Pt. II., 508, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable (*Rousillon v. Rousillon*, 14 Ch. D., 351; *Leather Cloth Co. v. Lorsont*, L. R., 9 Eq., 345; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall., 64, 68)."

This language is quoted with approval and is followed in *Fowle vs. Park*, 131 U. S., 88, 96.

There are numerous decisions in the lower Federal Courts to the same effect.

Thus in *Carter vs. Alling* in the Circuit Court for the Northern District of Illinois, 43 Fed. Rep., 208, a contract was upheld between a manufacturing corporation whose business extended throughout the United States and Canada, and one of its travelling salesmen, whereby he agreed not to enter the service of any business competitor of the corporation for three years after leaving its service, the Court saying, per BLODGETT, J., at p. 214 :

> "The modern agencies of commerce have enlarged the field for the manufacturer and salesman to, or *even beyond the limit of the continent* and to whatever extent a manufacturer or dealer has by his energy and enterprise made a market for his wares, to that extent *he has the right to protect his business from piratical competition by contracts like the one under consideration.*"

In *United States Chemical Co. vs. Provident Chemical Co.*, in the Circuit Court for the Eastern District of Missouri, 64 Fed. Rep., 946, it appeared that the plaintiff was engaged in the manufacture of bone tartar. It leased its building and equipment used in such manufacture to one W. with a covenant that during its continuance the plaintiff company would not engage in the manufacture of bone tartar. On the day the lease was made it was assigned with the consent of the plaintiff to the defendant Company which was engaged in the same business and had for many years been the chief producer of bone tartar. It appeared that the lease had been made with the intention that it should be assigned to the defendant Company, and that it was made for the purpose of removing the plaintiff's competition from the market. It was held that as the contract conferred no special or exclusive privilege, but left the trade open to the competition of any other parties, it had no tendency to create a monopoly; that it was no more than a lawful

exercise of the power to contract for the protection of the business of the defendant Company and was not against public policy, nor void, the Court saying :

> " The sense of the modern decisions is that, if the restraint is only commensurate with the fair protection of the business sold, the contract is reasonable, valid, and enforceable. It is only where the restriction can be of no avail to the vendee, and unnecessarily hampers the vendor, that it becomes oppressive and void."

The Court says further that " *the defendant had a perfect right to buy off the competition of a dangerous, powerful and aggressive rival,*" and again :

> " Our attention has been called to many cases which condemn, in perhaps not too severe terms, combinations and trusts. *It is a nervous and alarmed imagination which sees in every transaction involving large exchange of properties a monster threatening public interests.* Combinations in the nature of modern trusts, so soundly condemned, are those which aim at a union of energy, capital and interest to stifle competition and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of *exchange of one valaable right or thing for another.*"

In the very able opinion delivered by Judge TAFT (concurred in by Mr. Justice HARLAN and by Judge LURTON) in the United States Circuit Court of Appeals in the *Addyston Pipe* case, 85 Fed. Rep., 271, the learned Judge, while holding the contract then before the Court to be in violation of the Sherman Act, recognizes the validity of covenants which are ancillary to some lawful contract such as that of *vendor and vendee*, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract.

In *Harrison vs. Glucose Sugar Refining Co.*, Circuit Court of Appeals for the Seventh Circuit, 116 Fed. Rep., 304, it is said by JENKINS, Circuit Judge, at page 308 :

> " It is urged that the contract in question is one in restraint of trade because of the covenant that during the stipulated time of service the appellant would not, directly or indirectly, become interested in the specified business within a radius of 1,500 miles from the city of Chicago otherwise than under his engagement with the appellee. The doctrine of restraint of trade had its birth in conditions anciently obtaining, and now greatly changed. Then the area of trade was confined within narrow territorial bounds. Intercommunication has become largely extended, and trades anciently limited to a small locality have become national in their extent. The rule is bottomed upon the consideration whether such a covenant was broader than the covenantee required for his protection."

In *National Enameling & Stamping Co. vs. Haberman* in the Circuit Court for the District of Connecticut, 120 Fed Rep., 415, it was held that a restrictive covenant *unlimited as to time* and *in area covering the entire United States*, but which was ancillary to the main lawful contract, being in part consideration of the payment for *good will sold* was reasonable and no broader than is necessary to save to the covenantee the rights and privileges for which he has paid.

Judge PLATT reviews quite fully the authorities up to date in a very able, instructive and entertaining opinion.

In the very recent case of *Prame vs. Ferrell* (Cir. Ct. of App., 6th Cir.), 166 Fed., 702 (LURTON, SEVERENS and KNAPPEN, JJ. concurring) it was held that a covenant by a partner on the sale to his co-partner of his interest in the property and good-will of the partnership, not to engage in the same business, was a valid

covenant, though without limitation as to time or territory, it appearing that the partnership was engaged in the manufacture of an article then sold generally throughout the United States. The Court held that, construing the agreement so as to limit it to the United States, it was reasonable and enforceable.

The latest decisions in England are quite as emphatic.

In the case of *Leather Cloth Co. vs. Lorsont*, L. R., 9 Eq. Cases, 345, it appeared that upon the formation of a Company for the purchase and working of a certain process of manufacture introduced into England from America, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they to the best of their power allow to be carried on by others *in any part of Europe* any company or manufactory, having for its object the manufacture or sale of productions now manufactured in the business or manufactory" of the vendors.

The Court held that the restriction contained in this clause was not greater, having regard to the subject matter of the contract, than was necessary for the protection of the purchasers and was capable of being enforced against the vendors.

In *Rousillon vs. Rousillon*, 14 Ch. Div., 351, a general contract not to engage in the sale of champagne without limit as to space was held to be enforcible.

These cases of *Leather Cloth Co. vs. Lorsont* and *Rousillon vs. Rousillon* are cited with approval by the U. S. Supreme Court in *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396 (*supra*).

In the case of *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co.*, L. R. (1894), Appeal Cases, 535, the House of Lords reviewed at great length and in elaborate opinions the whole subject of covenants in restraint of trade. The contract before the Court was a covenant by a patentee and manufacturer of guns and ammunition with a company to which he had transferred his patent and business, that he would not for

twenty-five years engage, except on behalf of the company, either directly or indirectly in the business of a manufacturer of guns or ammunition. The Court held unanimously, affirming the decision of the Court of Appeals, that the covenant, though *unrestricted as to space*, was not, having regard to the nature of the Governments of Great Britain and other countries, and to the nature of the business and the limited number of customers, wider than was necessary for the protection of the company, nor injurious to the public interests of this country (Great Britain); that it was therefore valid and might be enforced by injunction.

The leading opinion is delivered by Lord Chancellor HERSCHELL, who says at page 541:

> "In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint of trade was only partial."

The Lord Chancellor calls attention to the change of conditions since the earlier times, when these decisions were made, and particularly calls attention to the fact that various businesses are co-extensive with the Kingdom, and then proceeds to lay down the true rule which should prevail, as follows (page 548):

> "Whether the cases in which a general covenant can now be supported, are to be regarded as exceptions from the rule which I think was long recognized as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular, the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the cove-

nantee, the distinction between general and particular restraints ceases to be a distinction in point of law. *I think that a covenant entered into in connection with the sale of the good-will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser.*"

And, again, at page 549 :

"My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shown that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. *If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory.* The only customers of the respondents must be found amongst the Governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another. So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom ; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. *They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad.* They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries ; and

for my own part *I see nothing injurious to the public interests of this country in upholding such a covenant.*"

This decision of the House of Lords settles the law of England where these contracts were entered into and sustains the validity of the covenants contained in Exhibit 1 and Exhibit 2.

(2) What has heretofore been said with regard to the provisions of the agreement known as Exhibit 1, applies equally to the provisions of Exhibit 2, to which Agreement The Imperial Company was also a party.

Exhibit 1 was an Agreement of sale of the plant and assets and good-will of the business of the Ogden Company to The Imperial Company, excluding, however, the export business of that Company. Exhibit 2 was an Agreement of sale by the American Companies and the Ogden's Limited to another British Company, to be formed under the laws of England, known as the British-American Company, of the export business of these various Companies and of the plants and good-will connected therewith. By the export business was meant the business of exporting tobacco products to countries other than the United States and Great Britain. The sale of this business and of the various plants, manufacturies and good-will connected therewith to the British-American Company was also accompanied by similar covenants on the part of the vendor Companies not to compete with the vendee Company. The same arguments which sustain the validity of the covenants in Exhibit 1, likewise sustain the validity of the covenants in Exhibit 2.

II.

The oral testimony shows that the agreements did not and could not, under the existing circumstances, operate to restrain trade or create a monopoly, and, therefore, could not and did not operate as a violation of the Sherman Anti-Trust Act.

Whatever inference there might be from any of the provisions of the agreements (Exhibits 1 and 2) that there was an intent to violate the Sherman law, is removed by the evidence.

It appears from the testimony that at the time of the Agreements there was *practically no exportation or importation of manufactured product between Great Britain and the United States.* Owing to the protective tariff in this country and the differential imposed upon imported goods in Great Britain, it was impossible to import into this country from England or to export from this country to England any appreciable amount of manufactured tobacco. It was not possible to sell manufactured tobacco imported into this country in competition with the domestic articles of manufacture, nor was it possible to export to England and sell in competition with domestic manufacture. A small amount was exported from each country to the other, which was sold at fancy prices to meet a special demand and to suit the tastes of particular persons. The total amount imported into this country of goods manufactured in Great Britain was only about 150,000 pounds per annum, which, as the testimony shows, constituted an inappreciable proportion of the total amount sold in this country and had no effect whatever upon the price (see testimony of Mr. Harris, Record, Vol. II., pp. 22, 25, 26, 58, 59).

The total output in this country in 1902 of cigarettes and smoking tobacco, as shown by Appendices F and H annexed to the Government's brief, was nearly 9,000,009 pounds (see our Statement of Facts, *supra*, p. 7).

The situation after the Agreements was precisely the same as before the Agreements so far as concerns any trade between the United States and Great Britain, or between the several States of this country. *The Agreements did not in fact operate to restrain any trade between Great Britain and the United States for the simple reason that there was no trade to restrain.* They did not operate to restrain trade by The Imperial Company in articles manufactured by it in the United States, because it *did not in fact manufacture* any tobacco products *in the United States.*

The evidence shows that there was no actual diminution in the business of exporting either leaf tobacco or manufactured tobacco from the United States to foreign countries by reason of the British-American agreement. The British-American Company simply took the place of the American and the Imperial in the business of exporting to foreign countries. The business instead of diminishing actually increased. A larger amount of American leaf tobacco was purchased on behalf of the British-American Company, and a larger amount of leaf tobacco and manufactured tobacco was actually exported after the British-American Company was formed than had been purchased or exported by both of the two Companies prior to the making of the agreement. There was in fact, therefore, no restraint of trade or commerce, nor was there any interference with free competition by other manufacturers or exporters.

The total exportation of American grown tobacco in 1890 was about 1,000,000 pounds. In 1906 the British-American Company exported about 30,000,000 pounds (Testimony of Mr. Harris, Vol. II., p. 66).

The effect of the formation of the British-American Co. has not been to reduce the exportation from this country of leaf tobacco into England in bond, to be manufactured in England and exported to other countries. Simply that instead of being imported into England by the Imperial Tobacco Co. it is now imported by the British-American Co. (pp. 79, 80).

The present exportation of leaf from this country

manufactured or otherwise by the British-American Co. is very much greater than the aggregate exportation of leaf for use in the export trade by the Imperial and American companies combined before the formation of the British-American (p. 80).

Prior to the agreement Exhibit 2, it had not been the course of business of the Imperial Company to export to foreign countries from the United States manufactured products. As heretofore many times stated in this brief, the Imperial Company at no time carried on the business of manufacturing tobacco products in the United States. All that the Imperial Company had done in the way of exporting had been in exporting leaf tobacco. After the agreements of September 27, 1902, it continued to purchase and export leaf tobacco for its own use for manufacture and sale in Great Britain. It had been accustomed to purchase leaf tobacco and export to Great Britain in bond and manufacture there for export to other countries. It was this business which it gave up under the arrangements entered into by Exhibit 2, and transferred to the British-American Company. That agreement, therefore, did not put an end to any manufacturing industries in this country, nor did it in any way affect the demand for the raw material or the quantity exported.

Counsel for the Government spent some time in endeavoring to show that the Imperial Company had sold *stems, scraps and offal* to the Kentucky Products Company, a corporation, the stock of which is owned by the American Tobacco Company. The relevancy of this line of proof is not quite apparent to us. There was some evidence introduced tending to show that the Kentucky Products Company objected to sales by the Imperial Company of the stems and offal produced by it in the course of "treating" leaf tobacco, and claimed that such sales were a violation of the agreement between the Imperial and the American Companies and called upon the American Company to take some steps to prevent such sales. Evidence was introduced tending to show, as counsel for the Govern-

ment claimed, that the American Company communicated with the Imperial Company and called their attention to the alleged infraction of the agreement. Counsel for the Government claimed that as a result there was some arrangement made by which the imperial Company agreed to sell to the Kentucky Products Company its products of stems, offal, etc.

Even assuming that there was some such transaction we still fail to see what it has to do with this case. There is, however, no basis for the claim set up by the Government in this regard. It seems from the evidence that when leaf tobacco is purchased a process is frequently resorted to by the purchasers before exporting in order to reduce the weight and the cost of shipment. This process is known as "treating." It consists of extracting the stems from the leaf. Coincidently with the extracting of the stems there is unavoidably extracted a certain amount of the leaf itself which adheres to the stems. The stems and scrap thus extracted from the leaf by the treating process become waste material and are sold as waste under the generic head of "offal" for various uses such as insecticides, manure, etc.

By the terms of the agreement Exhibit 1, the Imperial Company reserved the right to purchase and "treat" leaf tobacco in this country. In the process of "treating" this offal is produced. It is in the nature of a by-product.

The evidence shows that so far from acquiescing in the claim made by the Kentucky Products Company that the sale of its by-product was a violation of the agreement between the Imperial and the American Companies, the former Company asserted its right to sell to any person or persons, and the evidence shows that it has in fact sold to the highest bidder from year to year and that the Kentucky Products Company has not been the sole purchaser, nor has there been any discrimination in its favor.

See testimony of Mr. Carlton, General Manager of the Imperial in Richmond (Record, Vol. IV., pp. 273, 274).

III.

So far as the Bill of Complaint herein avers that there was any restraint of competition in the purchase of leaf tobacco, either by reason of the written Agreement (Exhibit 1), or by reason of any other agreement, arrangement or understanding, or any practice outside of the written Agreement, the evidence overwhelmingly disproves any such claim.

(a). Every witness examined in this cause on this subject has testified that there was no agreement, arrangement or understanding between the American Tobacco Company and The Imperial, or its representatives, to refrain from active competition in the purchase of leaf tobacco. The written Agreement has no such provision in it, but on the contrary, expressly reserves to The Imperial Company the right to purchase leaf tobacco in this country. The testimony shows *without any contradiction* that there has been *at all times active competition* between The Imperial Company's agents and the agents of The American Company and of the independent concerns and of the Rigi countries. We are much astonished that counsel for the Government continue to insist upon this claim.

The testimony shows, also, that *the price of leaf tobacco has increased since the Agreement was made and is still increasing.*

It is to be borne in mind in considering this case and the relations of the parties to the purchase of leaf tobacco that The Imperial Company has absolutely no interest whatsoever in the affairs of The American Tobacco Company. It is represented by independent agents in this country. It does not own any shares of stock in The American Company, nor do any of its Directors, except the three who represent the interest of The American Company in The Imperial stock

which interest is a minority interest (less than 5%), representing the balance of the stock transferred to The American Company in part purchase of the Ogden's Limited. This does not constitute any community of interest between the two Companies and certainly not any common control. The American Directors take no active part in the management of The Imperial Company. Only one of them attends the meetings. The American Company has been disposing of its stock in The Imperial Company since it acquired the same and owns to-day less than 5 per cent. of such stock.

(See on this subject the testimony of Mr. Harris, one of the Vice-Presidents of the American Company, Record, Vol. II., pages 56, 57).

At the date of the commencement of this action Mr. Welford C. Reed, who was made one of the defendants in this action, was the General Manager of the Imperial Company in this country and had charge of their business affairs, including the purchase of leaf tobacco.

Mr. Reed died on the 7th of December, 1907 (Record, Vol. IV., p. 234) before the testimony for the Government was concluded. It was therefore impossible to call him as a witness on behalf of the defendant the Imperial Company. His answer, however, in this cause denies that as a result of the agreements, or otherwise, the purchases made by the Imperial Tobacco Company in this country have been made without competition, and he avers on the contrary "that the purchases on behalf of the Imperial Tobacco Company have always been made in the open market and in competition with the other defendants' (Answer of defendant Reed, fols. 12, 13.)

He further denies that "leaf tobacco by agreement is purchased in the various States of the Union on behalf of the British-American Tobacco Company through defendant The American Tobacco Company without competition with any one of the defendants, but this defendant avers on the contrary that the Imperial Tobacco Company has at all times been and is now in active competition with the British-American Tobacco

Company and the other co-defendants in the purchase of leaf tobacco in the open market" (Fols. 14, 15).

Further: "This defendant denies that the purchases of leaf tobacco in the United States by the Imperial Tobacco Company are made without genuine competition, or that there has been any destruction of competition by the Imperial Tobacco Company with the other defendant Companies, as a purchaser of leaf tobacco, but this defendant avers that the exact contrary is the fact" (Fol. 20).

After the death of Mr. Reed he was succeeded by Mr. Edgar S. Carlton, as the General Manager in charge of the leaf buying interests of the Imperial Tobacco Company in America (Record, Vol. IV., p. 234). He was called as a witness by the Government and was examined as to the course of business of the Imperial Company in this country. His testimony was as follows:

He has been employed by the Imperial Tobacco Company since July 1, 1902. Prior to that time he was in the tobacco business on his own account, from 1893 to 1902, and prior to that time, from 1889 to 1893, he was in the leaf tobacco business and manufacturing together, for other parties. After he went with the Imperial Company on July 1, 1902, he was supervisor of other buying agents in Virginia and North and South Carolina, travelling from market to market and supervising the purchase of tobacco for the Imperial Tobacco Company (Record, Vol. IV., pp. 229, 230).

The organization utilized by the Imperial Tobacco Company in purchasing leaf tobacco throughout Virginia and North and South Carolina begins with the head office in Richmond from which the General Manager directs the purchases through the various territories by means of traveling supervisors, and through these traveling supervisors to the branch managers of the rehandling plants, who are the buyers on the warehouse floors.

There are nine markets in Virginia, North and South Carolina, where the Imperial Tobacco Company has a head buyer. Under those head buyers there are other

men in some of the markets. Danville, Virginia, has three tobacco sales running at the same time and requires three buyers. The Company operates in twenty-four markets. In nine of them it operates through its own buyers, and in the remainder on commission, and there are fifty or sixty small markets on which tobacco is bought and shipped to the various plants and markets to be rehandled (Record, Vol. IV., pp. 230, 231).

When Mr. Carlton went into the employ of the Imperial Company, Mr. McDonald was the head agent and Mr. W. C. Reed was the practical tobacco man. McDonald continued as the head agent for about three years and was then succeeded by Reed.

Witness was supervisor of purchases under Mr. McDonald and received instructions from him in a general way (Record, Vol. IV., pp. 231, 232). Mr. Reed and Mr. McDonald gave him averages of prices about which they expected him to buy the various grades and he was instructed to buy so much of a particular grade of tobacco, if he could, at a specified price, and he would then go into the market and get it on the best terms he could, round about those prices (pp. 232, 233).

Witness is now in charge as General Manager of all the purchases of the Imperial, not only in Virginia, North and South Carolina, but in Kentucky, Tennessee and Ohio (p. 234).

In the Southwestern portion of Kentucky the Imperial Company buys principally on the Louisville market through a broker. It buys at Owensboro, Henderson and Hopkinsville through salaried buyers. The buyers go through the country and buy directly from the farmers.

The warehouse system which prevails in Virginia has not been adopted to any extent in the West (pp. 234, 235).

Mr. Carlton testified on cross-examination that he never at any time received any instructions from anybody connected with the Imperial Company to refrain from competition with the American Tobacco Company, or any of its allied companies and did not, as a matter

of fact, refrain from competition with the American Tobacco Company or any of its allied companies. On the contrary, the American Tobacco Company has been one of his chief competitors straight through. He has been in active competition with the British American Company also. There has been no change in the course of business since he became General Manager.

> "Q. Have you issued any instructions to your subordinates or do you know of any instructions having been issued from any quarter with regard to refraining from competition in the purchase of leaf tobacco?
>
> "A. No, there have been no such instructions issued from my office by myself or anybody else" (p. 261).

The American Tobacco Company buyers have been in active competition with the Imperial Company in all of the principal markets. The independent buyers representing independent tobacco houses have been "very strong buyers." There has been more or less speculative buying at different periods. The "Rigi" people (that is, representatives of such foreign Governments as have a Government monopoly of the tobacco business) have had their agents in active competition with the Imperial Company (pp. 261-2).

The method of selling leaf tobacco on the warehouse floor is thus explained by Mr. Carlton at page 263:

> "The farmer hauls the tobacco to the market on wagons or ships it by rail; hauls it to a particular warehouse in Danville or some other market and the tobacco there is taken charge of by the warehouse operator or owner and placed on sale in rows, piles, according to the grades he has made, say each grade of the cured tobacco weighing 700 or 800 pounds, he would probably have seven or eight grades, as first his best leaf, second and third grade leaf, cutters, lugs and common types of tobacco. When the sale hour arrives the auctioneer

begins on one pile of tobacco, the buyers assemble around this pile of tobacco and bid according to their requirements ; it might happen that I would not be interested in the first pile and would not make a bid on it ; it might be that I was interested in the second pile and might have a half a dozen buyers on it ; each of us of course *would bid to his extreme limit in order to buy that pile of tobacco* and so on through the farmer's offering. If he is dissatisfied with any one of those piles of tobacco, he has the privilege when his last pile is knocked out, sold, he has the privilege of rejecting the bid made on any one of those lots or all of them, the farmer has, he takes it in, in other words.

" Q. He takes his tobacco back ? A. Takes his tobacco back.

" Q. And there is another auction sale held on it ? A. He has that privilege ; it is not offered again until the farmer designates the time he wants it offered ;the next day or perhaps next week or next month.

" Q. So that if the farmer thinks the price offered insufficient, too low, he withdraws his tobacco from the sale of that day, cancels the sale and sells it over again some other day ? A. Yes, he has that privilege.

" Q. Does he have to pay any extra charge for that ? A. No.

" Q. And that is the way the market price is fixed, is it ? A. Fixed by the auction sale, yes.

" Q. With the right of withdrawal by the farmer if he is dissatisfied ? A. If he is dissatisfied.

" Q. What effect does the price realized in any one season have upon the offerings by the farmers in the next season ? A. It has a very material effect. If the price running through the crop has been very low naturally he is not encouraged to increase his planting the next year, rather inclined to curtail it.

" Q. And plant some other crop in lieu of tobacco ? A. Yes " (pp. 263, 264).

A certain quantity at least of particular grades of tobacco has been bought to meet the needs of the Company for the coming season. The buyers do the best they can to get it at the lowest market price. Oftentimes if the grade of tobacco is scarce they have not only to meet the present market but to buy beyond the average market price.

Counsel for the Government in their brief refer to certain letters introduced in evidence, which they claim establish that there was some sort of an understanding between the American Company and the Imperiul Company with regard to prices at which leaf tobacco was to be purchased, and that objections were made as to unfair treatment in the matter of raising prices. These letters are fully explained by the testimony, and as so explained they do not in the least degree bear the construction placed upon them by counsel for the Government. It is quite apparent, however, that a warfare carried on by one of these Companies against the other for the mere purpose of cornering the market and preventing the other Company from making the purchases necessary for its business at the fair market prices might legitimately be complained of by the representatives of the Company aggrieved by such conduct. Such complaint would not even tend to prove that there was any understanding or agreement forbidding or restricting or interfering with fair competition between the parties. The proof is overwhelming and practically undisputed that there was *at no time any agreement or understanding* between the two companies or their representatives to that effect, and that there was in fact *at all times keen competition* between the Imperial buyers, the American buyers, the independent buyers and the Rigi buyers.

Mr. Carlton's testimony shows, and the tables of prices produced by him demonstrate, that the Imperial Company paid at all times, for the tobacco purchased in the Eastern markets, a higher average price than was paid by all the other buyers. Mr. Carlton did not have personal charge of the Western markets

until the middle of 1907, and does not undertake to testify except in a general way as to what was done in those markets, but there is no evidence produced by the Government to show that the Imperial was buying its tobacco in the Western markets at any less rate than the average market price paid by all consumers.

(*b*) So far is it from being the fact that there has been any injurious result to the farmer through any lack of competition, the fact is that *the amount of consumption of leaf tobacco and the price paid for it have both increased since 1902 up to the present time.*

Mr. Carlton testifies that in the Fall of 1902 there was an excited market. There was abnormal competition—a kind of war between the Imperial Company and the American Tobacco Company and independent tobacco dealers. Tobacco was not bought according to value. There were no real values that year. After that there was a decline in the price of tobacco. The cessation of hostilities or bitter fight between the American and Imperial helped to bring it about. The crop turned out to be 25 or 30 per cent. larger than anybody estimated it to be. That helped to bring it about (p. 265). The 1903 crop acreage was estimated to be practically as large as 1902, but the yield per acre was not quite so large; it yielded about 30,000,000 pounds less tobacco or 250,000,000 pounds that year, which was also a very large crop and way beyond the normal. That crop sold at the low price, because the general tobacco market was unsettled from the previous big crop. Tobacco dealers of all descriptions had large stocks unsold, tobacco lying on the English and American markets. There was only a year's supply to buy out of the 1903 crop. That together with the general depreciation caused by the unprecedented warfare of the year before made this crop of tobacco start off at a very low price.

The course of prices since 1903 has been "a strong upward tendency" (p. 266).

The general average of all sales in 1902–1903 for the three States of Virginia, North and South Carolina

was 9.98. The average price paid by the Imperial Company during that period was 10.41. This was for the period between August 1, 1902, and August 1, 1903 (page 267).

From August 1, 1903, to August 1, 1904, the average price paid by all purchasers was 6.31. The average price paid by the Imperial was 7.19.

The next year, 1904–1905, the average price paid by all purchasers was 8.59. The average price paid by the Imperial was 10.20.

The following year, 1905–1906, the average price paid by all purchasers was 8.64. The average price paid by the Imperial was 8.76.

The following year, 1906–1907, the average price paid by all purchasers was 9.43 and the average price paid by the Imperial was 10.48.

The next year, from August 1, 1907, to February 1, 1908, the average price paid by all purchasers was 10.30 and the average price paid by the Imperial was 11.44 (pp. 268, 269).

As to the purchases of Western tobacco, Mr. Carlton could not give the figures representing the average price of sales to all buyers, but did give the figures representing the average price to the Imperial Company.

The figures for the successive years from 1902 to date, with the exception of the year 1903–1904, showed a steady increase, the figures for 1902–1903 being 4.33; 1903–1904, 4.17; 1904–1905, 5.50; 1905–1906, 6.38; 1906–1907, 7.43; 1907–1908, 8.00. (Page 270.)

See to same effect as to the steady increase in price to the farmer, Exhibit annexed to Government's brief marked Appendix C.

The testimony of substantially all of the officers of the American Company and of its allied companies has been taken in this suit, either on behalf of the Government or on behalf of the defendants, and they have all testified that there has never been any agreement, arrangement or understanding at any time between the Imperial Company and the American Company, or any other of the defendants, other than

the agreements copies of which are annexed to the bill of complaint herein, and particularly that there has never been any agreement, arrangement or understanding with regard to suppressing competition in the purchase of leaf tobacco or fixing prices for the same. They also testified that, as a matter of fact, there has been at all times real, genuine and active competition between the buyers for the Imperial Company and the buyers for the other defendants in the market.

Similar testimony has been given by Mr. Yuille, who has had charge of the purchasing for the American Company in the eastern division of the country, and by Mr. Robert K. Smith, who has had charge of the purchasing for the American Company in the western division of the country.

To recapitulate the testimony on this subject, or to refer to the pages bearing on it would unnecessarily expand the volume of this brief.

(c) The American Company has not purchased any leaf tobacco for the Imperial Company, except a little tobacco of the crop of 1902-3, for which the Ogden Company had given orders to the American Company prior to the contract of September, 1902. Certain outstanding contracts or agreements the Imperial Company, as the purchaser of the Ogden Company, took over and completed. Since that year expired, *no purchases have been made for the Imperial Company by the American Tobacco Company* (Testimony of Carlton, Vol. IV., pp. 274, 275).

In like manner there were some purchases in 1902 and 1903 made in Virginia by the Imperial Company for the branches of the British-American Tobacco Company abroad. Certain orders for the Imperial's export factories in England were supplied through that year after the British-American Company had been formed,—the orders having been given before the formation of that Company.

There were also some small purchases for the British-American Tobacco Company in 1904.

Since 1904 the Imperial has not bought any leaf

tobacco for the American Tobacco Company or for the British-American Tobacco Company (Vol. IV., pp. 275, 276).

Counsel for the Government have scratched with a fine-tooth comb for some shreds of evidence against the Imperial Company.

Purchases of Perique tobacco have been called attention to as having been made for the Imperial Company by the American Company.

This is certainly a case of "*de minimis*" and is only pertinent as illustrating the straits to which counsel for the Government have been driven to find some evidence in support of the charges of their bill.

The facts are that Perique tobacco is a special kind of tobacco grown only in one parish in Louisiana. The requirements of the Imperial Company of this tobacco are so small that it has never really been considered seriously as a part of the tobacco business of that company, only from 20,000 to 30,000 pounds of it being used in a year, amounting to about $6,000 to $8,000 a year. This was purchased through the American Tobacco Company for purposes of convenience, none of the Richmond organization knowing anything about the Perique tobacco or the manipulation or purchase of it. The arrangement for the supply of this tobacco terminated in 1907 (Record, Testimony of Carlton, Vol. IV., pp. 277, 278).

References to *purchases of "Turkish" tobacco* in the brief of counsel for the Government seem to us so clearly irrelevant that we are at a loss to understand why such references are made. Purchases of Turkish tobacco abroad by the American Company are clearly irrelevant to any question of competition in American leaf tobacco in this country.

Such leaf tobacco as the Imperial Company needs for its cigar business is bought by an agent who comes over from England for that purpose. It is a small percentage of their requirements; most of it is bought abroad in foreign markets.

None of it is bought from or through the American Cigar Company (Testimony of Mr. Carlton, Record, Vol. IV., pp. 278, 279).

IV.

No decree can be made in this suit as against the Imperial Co. which will be just and equitable.

The Imperial Tobacco Company of Great Britian and Ireland, Limited, has parted with value on the faith of the agreements entered into with The American Tobacco Company in September, 1902, and on the faith of the organization of the British-American Company.

In the first place it purchased the Ogden's Limited outright and took a transfer of the assets of the Ogden's Limited, in consideration for which it paid a large amount in cash and issued a large amount of its own securities to The American Tobacco Company, the owner of the Ogden's Limited. It also transferred to The American Tobacco Company its right to its labels and trade-marks and brands, with the right to use the same in the United States. Its covenants not to engage in business in the United States in manufacturing and in selling manufactured articles were merely incidental to the purchase of the Ogden's Limited in England and to the transfer to The American Company of the right to use its labels, brands and trade-marks in the United States.

No decree can be made in this suit which will do justice to the Imperial Company short of returning to The Imperial Company the consideration which it parted with on the faith of the purchase of Ogden's Limited and on the faith of the covenants of The American Company. But such a decree is manifestly impossible. It would involve the title to property in England and to the stock of English corporations.

So also, under the British-American agreement (Exhibit 2), the Imperial Company parted to the British-American Company with valuable assets on the faith of the agreement, irrespective of its good-will, labels and trade-marks and other intangible assets. The tangible

assets conveyed by the Imperial in the shape of factories, real property, fixtures, machinery and materials amounted to upwards of $3,000,000 in actual value, for which it received that amount in cash (see Testimony of Harris, Vol. IV., pp. 735 to 743).

The sale of these assets by the Imperial to the British-American was accomplished in England, and the purchase price was paid in England by the British-American Company in cash from funds on deposit to its credit in a bank in London, which funds were derived from the sale of stock of the British-American Company to the Imperial Company and the American Company pursuant to the agreement.

No decree can or should be made restraining the American Company from carrying out its covenants with the British-American Company since those covenants were part of the consideration on the faith of which the British-American Company purchased the export business and the good will connected therewith of Ogden's Limited and the American Company and its allied companies, and were also part of the consideration moving to the Imperial Company, and inducing it to part with its export business and good will to the British-American Company.

It is manifest that *short of a decree undoing all that has been done* and setting aside the contract *in toto gross hardship would result to the Imperial Company* and it is manifest that *no decree undoing all the transactions can be made in this suit which would be effective in England or binding upon the Imperial Company or the British-American Company in that country.*

If it be suggested that the Imperial Company can be enjoined from carrying on business in this country at all until it shall comply with any decree that may be made by this Court the answer to that proposition is that *such a decree would operate to the injury of American trade*, and would be *a greater restraint upon trade and commerce between this country and foreign nations* than the agreements complained of could possibly be.

What the practical result would be of a cessation of *purchases of leaf tobacco*, which is *the only business carried on in this country by the Imperial Company*, upon the interests of the farmers can only be conjectured. To enjoin one of the largest consumers of leaf tobacco from purchasing would certainly not tend to enhance the price of the raw material in the hands of the farmers and would certainly not be in the interest of the American producers.

Nothing short of a dissolution of the British-American Company and the winding up of its affairs and the re-conveyance of its assets, would accomplish substantial justice as between that Company and its two principal stockholders, the American Company and the Imperial Company. This is impracticable since the Courts of Great Britain alone can adequately administer the affairs of the British Company.

Indeed, it is *difficult to conceive of any relief* which can be granted *in this suit which would not produce inextricable confusion and injustice* and we submit that *no relief can or should be granted against this defendant.* This suit is brought in equity and should be decided upon principles of equity. Whether or not equity is the proper *forum* in which to enforce a penal Statute is a question which we have not thought it necessary or proper to discuss. The Statute so provides and we submit to the jurisdiction of this Court as a Court of Equity. It cannot be, however, that when Congress has authorized a Court of Equity to enjoin the performance of an agreement claimed to be in violation of a statute, it authorizes the court to proceed without regard to consequences, and without regard to the ordinary principles applicable in a Court of Equity. The Court will not "run amuck" and make a decree which shall play havoc with vested interests and *will not make any decree whatever unless it can find a method of doing justice and equity without accomplishing wanton injury.*

V.

Neither Exhibit 1 nor Exhibit 2 violates the spirit of the statute by raising the price to consumers, lowering the price to producers or preventing competition.

There are three possible evils aimed at by the Sherman Anti-Trust Act: First, the *raising of the price of a commodity to consumers;* second, the *lowering of the price of raw material to producers;* third, the *crushing out of competitors.*

We have assumed for the purposes of this case, that the lowering of the price to producers is one of the evils against which the Sherman Act is aimed, although were it necessary to do so, we might very well dispute this proposition and might successfully contend that raising the price to the consumer is the evil aimed at.

There is no evidence in the case at bar that the agreements between the Imperial Company and the American Company which are attacked in this suit have resulted in either of these three evils.

1. There is *no evidence that the price* of tobacco products in any of their forms *has been raised to the consumer.* So far as appears the price has remained the same.

2. There is *no evidence that the price to the producers* of leaf tobacco *has been reduced;* on the contrary, the evidence is uncontradicted that the price has steadily increased.

3. There is *no evidence that any competitor* has been in any way *interfered with* by reason of the agreements between the Imperial Company and the American Company. Every manufacturer in the United States has been at liberty to manufacture and export his goods without any hindrance on the part of either the Imperial or the American or the British American or any of the other defendants in this case.

It is to be noted that the agreements in this suit do not undertake to fix prices or to pool profits or to eliminate competition in any way or to interfere with the ordinary laws of supply and demand.

VI.

The decree of the United States Circuit Court for the Southern District of New York dismissing the bill as to the Imperial Tobacco Company of Great Britain and Ireland (Limited) should be affirmed.

WM. B. HORNBLOWER,
JOHN PICKRELL,
WILLIAM W. MILLER,
MORGAN M. MANN,
Of Counsel for Appellee, The Imperial Tobacco Co.

Office Supreme Court, U. S.
FILED.
JAN 13 1910
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 118.

UNITED STATES OF AMERICA,
Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Appellees.

SUPPLEMENTAL BRIEF FOR THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, LIMITED, APPELLEE.

WILLIAM B. HORNBLOWER,
JOHN PICKRELL,
WILLIAM W. MILLER,
MORGAN M. MANN,
Of Counsel for the Imperial Company, Appellee.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

In the Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 316.

UNITED STATES OF AMERICA,
Appellant,

AGAINST

THE AMERICAN TOBACCO COMPANY
and others,
Appellees.

SUPPLEMENTAL BRIEF FOR THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, LIMITED, APPELLEE.

I.

The expressions of Mr. Justice PECKHAM in the opinions of this Court in the two cases of *U. S. vs. Trans-Missouri Freight Association*, 166 U. S., 290, and *U. S. vs. Joint Traffic Association*, 171 U. S., 505, to the effect that contracts in restraint of trade are invalid under the Sherman Law, whether "reasonable" or "unreasonable," are to be taken in connection with the qualifications of the learned Justice himself, especially as set forth in the opinion in the *Joint Traffic* case.

In that case (171 U. S., 566), Mr. Justice PECKHAM, delivering the opinion of the Court, says:

> "In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the

individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

"As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; *the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop;* the withdrawal from business of any farmer, merchant or manufacturer; *a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business;* and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

"This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

> " *We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business.* * * * We also repeat what is said in the case above cited, that '*the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.*' To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

It will be observed that the learned Justice expressly states that the statute is to have a " reasonable construction." The test of reason must be applied to this statute, as to every other statute, by the Court. It must be assumed by the Court that Congress intended to pass a workable and reasonable statute, and not an unworkable and unreasonable one; that Congress intended to pass a statute which would be beneficial to the community, and not a statute which would be disastrous and ruinous in its application.

To construe this statute literally as rendering invalid every contract which restrains competition, would render illegal the classes of contracts referred to by Mr. Justice PECKHAM in his opinion and would produce chaos in the business world.

This statute never has been, and never can be literally and strictly applied. Giving it a reasonable construction, the classes of contracts referred to by Mr. Justice PECKHAM must be excluded. The agreements between the American Company and the Imperial Company come clearly within one of the classes of exceptions mentioned by Mr. Justice PECKHAM, namely, the sale of a factory and plant and good-will with accompanying covenants against competition.

What Mr. Justice PECKHAM really meant when he laid down the rule that contracts in restraint of trade were invalid within the meaning of the act, whether reasonable or unreasonable, is shown further by his explanatory statement in the *Joint Traffic* case. The expression is to be limited to contracts between railroads, engaged in interstate commerce, carrying on a public business, and charged with the duty of competition. In the case of public service corporations of that character any contract restraining competition, or putting it in the power of the parties to restrain competition, is a violation of the Sherman Law, whether in the opinion of the Court it is "reasonable" or "unreasonable," beneficial or injurious, wise or unwise.

Mr. Justice PECKHAM says (171 U. S., 568):

> "*The question really before us is* whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint of interstate commerce, *a contract or combination between competing railroad corporations* entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, *even though the rates and fares thus established are reasonable.* Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. * * *
>
> "Has not Congress with regard to interstate commerce and in the course of regulating it, *in the case of railroad corporations*, the power to say that no contract or combination shall be legal which shall restrain trade

and commerce by shutting out the operation of the general law of competition? We think it has."

The learned Justice proceeds to discuss at length the nature of the franchises of a railroad, and on page 570 he says:

> "We do not think, when the grantees of this public franchise are *competing railroads* seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for the time be not more than are *reasonable*. They may easily and at any time be increased. It is the *combination of these large and powerful corporations* covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

It will, therefore, be seen that the dicta of the Court in the *Traffic* cases with regard to "reasonable" and "unreasonable" contracts in restraint of trade are to be limited strictly to contracts between railroad or other public service corporations, and have no application to contracts between private corporations.

At any rate, it is perfectly clear from the opinions of this Court, that contracts of the nature of the agreements involved in this suit between the American Company and the Imperial Company, are not within the prohibition of the statute.

The language of Mr. Justice HARLAN'S opinion in the *Northern Securities* case, 193 U. S., 197, are likewise to be limited to contracts between Railroad Companies, especially in view of Mr. Justice BREWER'S concurring opinion.

II.

There is no evidence that the Imperial Company in 1902, prior to the agreements with the American Company, intended to begin the manufacture of tobacco products within the United States.

The Attorney-General in his closing argument stated that there is evidence in the record that prior to the agreements of September, 1902 (Exhibits 1 and 2), the Imperial Company intended to establish manufactories in the United States, basing, as we understand it, this statement upon the testimony of Mr. Hill, one of the Vice-Presidents of the American Tobacco Company. This appears in Vol. II. of the record, at pp. 210 and 211, and pp. 241–246, and is, in substance, as follows:

Mr. Hill was asked by Mr. McReynolds (p. 210) whether or not he was "advised of the fact that the Imperial Company was considering the advisability of establishing factories in the United States." He replied that he had never heard of such a thing, and he was then asked whether or not he testified about the matter before the Grand Jury and whether or not he knew, prior to September, 1902, through rumor or otherwise, that the Imperial was considering this step. His answer was that he did not believe that he knew it, that he did not know that he ever knew it, that he certainly knew nothing about the date, and that he had no recollection whatever of being advised just prior to the agreement (Ex. 1) of this purpose of the Imperial Company. He was again questioned as to this (pp. 241 *et seq.*) and again stated that he had no recollection whatever of the matter.

Certain testimony alleged to have been given by Mr. Hill before the Grand Jury was read to Mr. Hill, but he denied remembering anything about it. The testimony itself was not put in evidence from the stenographer's minutes. It would not have been competent as against the Imperial Company if offered. The only effect of it would have been to discredit the testimony of Mr. Hill, who was the Government's own witness. He was not an officer of the Imperial Company, but of the American Company. The Imperial Company was not a party to the proceedings before the Grand Jury in any shape or form.

Furthermore, even if there had been rumors with regard to

the intention of the Imperial Company to start manufactories in this country, that circumstance would have been of no significance. The question would remain, were the rumors true? There was no attempt whatever by the Government to prove this fact.

The persons who were directly concerned on behalf of the American Company with the agreements of September, 1902—Mr. Duke, Mr. Fuller, Mr. Ryan and Mr. Harris—stated positively that they had heard nothing of this intention of the Imperial Company.

The testimony of Mr. Duke (Record, Vol. IV., p. 454) was:

> "Q. It is alleged in the bill of complaint or petition that just prior to these agreements the Imperial Tobacco Company had intended to establish factories for the manufacture of tobacco in the United States and were prevented by the execution of these agreements. Had you heard anything of that?
>
> "A. I had not."

That of Mr. Fuller (Vol. IV., p. 716):

> "Q. Had you heard of any prospective building or acquisition of manufacturing plants in America by the Imperial?
>
> "A. I had not, sir."

That of Mr. Ryan (Vol. IV., p. 726):

> "Q. Were you actuated in the making of this agreement by any threats on the part of the Imperial Co. that they were going into business in the United States?
>
> "A. None whatever.
>
> "Q. That they were going to establish factories for their business in the United States; had you heard any such statements or rumors thereof?
>
> "A. No.
>
> "Q. None whatever.
>
> "A. None whatever."

And at page 727:

"Q. You have testified that you had not heard of any intention on the part of the Imperial Tobacco Co. to engage in the business of manufacturing tobacco products in America?

"A. Yes.

"Q. So that question did not enter into or become a part of the subject of the negotiations in England, nor was it a consideration?

"A. Oh, no; there was nothing of that kind that I heard of."

And that of Mr. Harris (Vol. IV., p. 741):

"Q. Mr. Harris, had you heard any rumors about the Imperial Company expecting to begin manufacturing in this country at the time you went to Europe in the summer or fall of 1902?

"A. No, sir.

"Q. And you had no discussion on that subject with any of your brother officials?

"A. None whatever."

III.

There being a total failure of proof on the part of the Government to support the charges that there was an absence of real competition between the Imperial Company and the American Company in the purchase of leaf tobacco and the evidence being overwhelming that there was at all times real, substantial and active competition, the Government in their brief endeavor to make out some kind of a case of collusion between the two Companies by referring to certain letters passing between the American Company and the Imperial Company and between the agent of the Imperial Company in this country and the Imperial Company itself in the years 1902 and 1903. Those

letters are fully explained in Mr. Carlton's testimony. As a matter of fact, they show that the two Companies were in actual competition, but were complaining from time to time of unfair methods of competition, just as they might complain of unfair competition by any other outside competitor. These letters are all in the early period of the contract relations of the two Companies, 1902 and 1903. After 1903, the condition of active and actual competition between the two Companies seems to have been recognized and acquiesced in by both parties, and as already stated, the testimony shows it to have been an active and genuine competition, with the result that the Imperial Company was paying higher prices for their tobacco, than the American, as is shown by Mr. Carlton's figures.

Not a single farmer or producer of tobacco in the United States was called as a witness by the Government to show that the producers have any grievance against the American Company or the Imperial Company, or that they have suffered by lack of competition.

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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

118.

THE UNITED STATES OF AMERICA,

Petitioner-Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,

Defendants-Appellees.

119.

THE AMERICAN TOBACCO COMPANY AND OTHERS,

Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR THE DEFENDANT THE AMERICAN TOBACCO COMPANY AND CERTAIN OTHER DEFENDANTS-APPELLEES IN THE FIRST OF SAID APPEALS AND APPELLANTS IN THE SECOND.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Petitioner-Appellant, AGAINST THE AMERICAN TOBACCO COMPANY and others, Defendants-Appellees.	No. 316.
THE AMERICAN TOBACCO COMPANY and others, Appellants. AGAINST THE UNITED STATES OF AMERICA, Appellee.	No. 317.

Reply Brief for the Defendants The American Tobacco Company and certain other Defendants—Appellees in the first of said appeals, and Appellants in the second.

Facts.

Most of the contentions with respect to matters of fact found in the Government's brief or in the

oral argument for the Government were foreseen, and sufficiently answered in the main brief of these defendants. It is hoped that there will not be any repetition in this brief.

It was Judge Caldwell of the Eighth Circuit who said: "The sea of suspicion has no shore, and the Court that embarks upon it is without rudder or compass" (a). The same might be truly said of counsel; the Government's brief shows the pernicious effect of the habit of suspicion.

I.—The American Tobacco Company and The Imperial Tobacco Company have buyers on various markets, principally in Virginia, North Carolina and South Carolina; these buyers bid on piles of tobacco that are exhibited on public warehouse floors and bid in competition with themselves and others, each pile being knocked off to the last and best bidder. The leaf buyers of The American Tobacco Company and the leaf buyers of The Imperial Tobacco Company were put on the stand by the Government, and every one of them testified that there is absolutely no collusion between the buyers of the two companies, but that they are competitors in fact for all they buy (b). If this were not true, every tobacco market in Virigina and North Carolina would swarm with men who would know it was not true—men not connected with The Imperial Tobacco Company or The American Tobacco Company, but who daily see the conduct of the buyers of these companies on the warehouse floors. The Government introduced not one such man; not a producer is introduced—and it is assumed that it is they who are thus injured; but the Government says that all the testimony of the various employees was wilful falsehood, and

(a) Boyd *v.* Glucklich, 116 Fed. 131, 140.

(b) Record, Vol. II, pp. 119-120.
Record, Vol. II, pp. 178-179.
Record, Vol. IV, pp. 290-293.

reiterates repeatedly in its brief that there is no competition between these companies in the purchase of leaf. They draw this inference, which involves the simple charge of perjury against many witnesses, on a suspicion engendered by the fact that during 1903 there is correspondence between representatives of the two companies indicating some sort of concerted action in respect to the purchase of some sort of leaf. It is stated in the main brief filed for these defendants that on account of the dividing up of the foreign business theretofore done by The American Tobacco Company and The Imperial Company, and after September, 1902, done by the British-American Tobacco Company, Limited, there was necessarily correspondence during 1902 and 1903 between these two companies about leaf matters. The testimony in this case was all taken in 1907 and 1908, four years after 1903; the main offices of The Imperial Tobacco Company in this country were in Richmond, and their letters were examined to the satiety of the counsel for the Government (a). The main offices of the American companies were in New York, and their letters were examined until counsel for the Government were exhausted in their efforts. Not a single letter was introduced that showed the slightest intercommunication between buyers of leaf tobacco for the two companies after 1903—the date up to which time, as everybody has stated, there was necessarily occasional communication between the two companies. This is to say nothing of letters brought out in the examination of the main representative of the Imperial company in this country, which affirmatively show competitive conditions (b).

II.—As stated in the oral argument and in the brief, the Government has examined all of the

(a) Record, Vol. IV, p. 287.
(b) Record, Vol. IV, p. 286.

intimate letters and copies of letters written by heads of selling departments to men in the field; by men in the field to men at the New York office; by men in the New York office to men at the factories, etc.; these letters and copies of letters aggregate unquestionably many thousands; they were all that had accumulated in years of business activity, and communication had to be by letter. All the letter books and letter files of J. B. Cobb, the president of American Cigar Company; of W. R. Harris, C. C. Dula and P. S. Hill, Vice-Presidents of The American Tobacco Company; of the offices of The Imperial Tobacco Company in this country; of the R. J. Reynolds Tobacco Company; of the Pinkerton Tobacco Company; and of R. K. Smith and T. B. Yuille, who manage the buying of leaf for The American Tobacco Company, were thus subjected to examination by counsel for the Government; and J. B. Duke, President of The American Tobacco Company offered counsel for the Government like examination of his letter books and letter files (a).

We speak now as to methods of competition, and it would be interesting to find any company or any individual whose private letters would stand such an inspection without the development of something that to a suspicious mind would induce suspicion. Of course, the employees of these defendants sought to push their own goods, and, of course, there was a tendency to fight back in competition. The striking thing, though, is that the Government attaches so much importance to what in its result was so infinitesimal.

(a) Record: Vol. IV, p. 437 (Duke); Vol. III, pp. 78-79 (Cobb); Vol. II, pp. 683-685 (Dula); Vol. III, p. 361 (Hill); Vol. III, pp. 432, 457, 460, 508, 513-4 (Harris); Vol. IV, p. 287 (Imperial Co.); Vol. III, pp. 591-592 (Reynolds Co.); Vol. IV, p. 15 (Pinkerton Co.); Vol. II, p. 194 (Smith); Vol. II, p. 116 (Yuille).

Between July 8th and July 20th, 1903, Vice-President Hill of The American Tobacco Company wrote five letters to various salesmen indicating that he had some sort of information that "Sovereign" cigarettes had been shipped to the territory where these salesmen traveled (a). From this circumstance only, and without a particle of testimony, the Government says that there was a spy employed by the defendants in the factory where these "Sovereign" cigarettes were manufactured, and that the efforts of the defendants prevented their distribution at all. If there were a spy in their factory, is it not singular that there were no letters except these five? The spy must have been quickly discharged, or derelict in the performance of his duty. There are a thousand ways conceivable in human affairs for the accidental or incidental obtaining of such information that does not involve the employment of a spy, and the answer of Vice-President Hill that he really had no recollection of the way of his getting the information (b) impresses one as true, and does not bear out the assumption that a spy was employed. More important still, the Government put on, for some purpose, the man who had been in charge of this business of manufacturing and selling "Sovereign" cigarettes, which it is alleged the defendants were trying to crush, and he testified that he conducted his business in competition with The American Tobacco Company successfully and unobstructedly, and would not hesitate to go into business again in competition with it (c).

Reference has already been made in the main brief to the fact that the competition of Nall & Williams Tobacco Company with The Nashville

(a) Record, Vol. III, pp. 133-138.
(b) Record, Vol. III, p. 134.
(c) Record, Vol. III, pp. 575-577.

Tobacco Works never materialized, or at least never was felt by The Nashville Tobacco Works (a).

Letters are printed in the Government's brief indicating a desire that The Craft Tobacco Company of New Orleans should be especially active in competition with The People's Tobacco Company of the same place, but the testimony shows clearly that it was The Craft Tobacco Company that went out of business while The People's Tobacco Company succeeded by the aid of Union Labor in its boycott of the goods of these defendants, and took the trade (b).

There is a suspicion in the minds of counsel for the Government that the British-American Tobacco Company prevented other manufacturers from doing an export business, because Vice-President Hill of The American Tobacco Company attempted to ascertain the destination of a foreign shipment of cigarettes made by the Ware-Kramer Tobacco Company of Wilson, North Carolina. Vice-President Hill attempts no concealment in his testimony of the fact that he did seek this information, and that if he obtained it, he likely furnished it to British-American Tobacco Company, a company in which his Company, The American Tobacco Company, owned two-thirds of the stock (c). There is absolutely no evidence as to what use British-American Tobacco Company made of this information, if it received it, and absolutely no syllable of testimony as to any injury that was done the Ware-Kramer Company. This letter of Vice-President Hill seeking the information of the shipment of the Ware-Kramer Company was in 1905, and it was in 1907 that the Ware-Kramer Company wrote to a merchant in Calcutta, India, a letter which shows that they had not been in any way disabled in busi-

(a) Defendant's main brief, p. 109.
(b) Record, Vol. II, pp. 401-402.
(c) Record, Vol. II, p. 298.

ness, and that incidentally throws light on other interesting matters of this record. This letter boasts that the Ware-Kramer Company has—

> "The most complete and up-to-date cigarette factory in the world, being equipped with every modern device known to the manufacturer of cigarettes, and are at present preparing to build a building which will be the largest individual cigarette factory in the United States."

The letter also shows the kind of competition which these defendants have had to meet at home and abroad; the charge is distinctly made that the cigarettes of British-American Tobacco Company are made from stems and not tobacco leaf, a charge that, according to all and the only testimony in this case, was absolutely untrue and distinctly libelous (a).

So the record goes; and without more thoroughly particularizing than is contained here and in the main brief of these defendants, it may be confidently stated that the Government has in its brief looked with a malevolent eye upon every chance expression, and has sought to gather from that the policy and purpose of a great business organization; and that even thus looking, there is no evidence of any competitor injured by the operation of a secretly controlled company; no evidence of the business of a competitor diminished in volume or profit by any of the activities of these defendants.

III.—It has been argued that there is no competition between The American Tobacco Company and companies in which it holds stock; the Government has professed to find it impossible to conceive that there is any competition between The American Tobacco Company and the R. J. Reynolds

(a) Record, Vol. III, pp. 455-457.

Tobacco Company, for instance—although they say that the tobacco business is a matter of brands, and that every manufacturer is attempting, without respect to the name of the manufacturer, to push into popularity his brands. With this view of the Government the Attorney-General in his oral argument seemed to take sharp issue, because the most conspicuous letter read by him was a letter written by one Dulaney who, having sold to The American Tobacco Company an interest in his business, complained of competition and unfair treatment he was receiving from it. A few things about this letter ought to be mentioned, though: Before the suit was brought Mr. Dulaney had sold his minority interest to The American Tobacco Company, and at the time of bringing the suit The American Tobacco Company owned the whole of the business (a). He was not in any position to be frightened by the power of The American Tobacco Company, and would have been only too glad to have gone on the stand and testified, if he had been treated unfairly by the Company. Vice-President Hill, in whose testimony this letter was brought out, testified with respect to the letter, that there was competition between the two companies, but no unfair treatment of the one by the other; that Mr. Dulaney at the time of its writing was irritated about some condition which he later understood, and understanding which he had withdrawn the criticism made in the letter—"Mr. Dulaney, not being very much in touch with the business, got reports which were absolutely unfounded, and which he has always admitted since were incorrect" (b). This testimony of Mr. Hill was given in November, 1907, and the case was not closed until March, 1908—ample time intervening for the Government to introduce Mr. Dulaney; if his

(a) Rec., Vol. II, pp. 386-7.

(b) Record, Vol. II, p. 321.

charges of maltreatment were well founded, he was anxious to testify; but he never came to the stand.

IV. Counsel for the Government unquestionably left upon the mind of this Court in his opening argument the belief that the record in this case contained evidence of a causal relation between the activities and success of these defendants in the tobacco business, and the disorders in Kentucky and Tennessee which have been notorious. As a matter of fact, though, with respect to this matter there is not a shred of testimony to serve even as the excuse for a suspicion. The matter of disorder in the tobacco producing field of Kentucky and Tennessee is not once referred to by any witness, whether produced by the Government or the defendants; there does not appear a single officer or member of any association of producers of tobacco or any producer of tobacco at all, to complain of the conduct of these defendants in the purchase of leaf tobacco; there is not an attempt on the part of the Government to show decreasing prices—on the other hand, all of the evidence shows increase in prices for leaf. Nowhere in the record is the attitude of these defendants to tobacco producers or associations of tobacco producers so clearly set forth as in a letter written by J. B. Duke to the president of the Burley Tobacco Association in Lexington, Kentucky, in 1903, introduced by these defendants in the examination of Mr. Duke; this letter is in reply to and a refusal of the solicitation of the president of the association, that these defendants join in a boycott of farmers who did not belong to the association. (a) Moreover, it appears that of the types of tobacco grown in parts of Kentucky and including the whole Tennessee crop—Southern Kentucky and Upper Cumberland, and Dark Western, including Hender-

(a) Record, Vol. IV, p. 432.

son District—the Regie or Government monopoly buyers purchase by far the larger part—these defendants in the aggregate buy less than twenty-five per cent. (a), and there is not even an allegation in the complaint, and not a syllable of proof, that there is or has ever existed any sort of understanding or combination between any of these defendants and any Regie or Government buyer.

With the tremendous powers that have been given by the decision of this Court in *Hale* v. *Henkel* to the Government for the examination of witnesses and otherwise securing information from the corporation against whom action is contemplated, which power as shown by this record has been used in this case; (b) with the tremendous appropriations that have been made by Congress for the carrying out of the provisions of the Anti-Trust law; with the activities of skilled lawyers and special agents that are now and have been in the service of the Government to ferret out so-called business improprieties and crimes—it is simply inexcusable for the Government to ask that companies or individuals be convicted of misdoing on a suspicion which could be resolved into demonstration if the facts justified the suspicion, and which, unless so demonstrated, should be disregarded.

Impropriety of the inclusion in the Government's Brief of extracts from Year Book of Department of Agriculture and reports of Bureau of Corporation.

The Government's petition was filed in July, 1907. Testimony was taken from November, 1907, to March, 1908, on the issues assumed to have been raised by the petition and answers. In the course

(a) Record, Vol. V, Government's Ex. 76.

(b) Record, Vol. II, pp. 211, 241-6; Vol. II, pp. 119, 149; Vol. III, p. 552.

of this testimony the Government brought out testimony, so far as it desired, of the production of leaf tobacco in this country by crops for the years 1903, 1904 and 1905 from witnesses introduced by it, and called all the witnesses it desired to call. There was no suggestion that the testimony with respect to the amount of tobacco raised in this country was in any way incorrect. But in the Government's brief numerous references are made to the Year Book of the Department of Agriculture in order to contradict this testimony of the Government's witnesses; and to reports made by the Bureau of Corporations in order to contradict testimony introduced by the Government, or to supplement its testimony. These reports of the Bureau of Corporations are relied on to show the value of tangible property conveyed in 1890 to The American Tobacco Company (in order, presumably, to justify the Government in its argument that the Company has been extremely profitable and was largely over-capitalized); to show that there has been some advance in the cost of tobacco to consumers (although it is not shown that the increase of cost of tobacco has in any way kept pace with the increased cost of leaf tobacco or labor, or with the increased cost of commodities in general, and although the Government says that no testimony of this sort was introduced because such matters seemed to it irrelevant) (a); and other matters which are separately of slight importance, and are difficult to call to the Court's attention because the references are scattered all through the Government's brief.

It would be very singular if the insertion of such matter were justified by the authorities, for surely it marks the very limit of unfairness. Counsel for the Government, in his oral argument, conceded that the Year Book was inaccurate, and to insert

(a) Government's main brief, p. 142.

it in his brief and thus bring it to the attention of this Court as a matter of which this Court will take judicial notice, and not to give the witnesses called by the Government itself an opportunity to show its inaccuracy, shocks one's sense of fair dealing. Its extreme inaccuracy is shown by a tabulated statement annexed as Appendix A. What must be said, though, of the attempt to have the Court take judicial notice of the conclusions reached by the accountants of the Bureau of Corporations of the Department of Commerce and Labor when these conclusions were reached and published in June, 1909, more than a year after the record in this case was closed, more than six months after the decision was rendered which is now on appeal, and months after the appeal was perfected and docketed in this Court? When one attempts to arrive at costs and profits, differences of opinion are involved, and these defendants have had no opportunity to cross-examine the young gentlemen who are the examiners for the Bureau of Corporations, and no opportunity to contradict or criticize their conclusions. The defendants have not been called upon to meet the issue because the Government says that in its taking of proof it regarded some of these matters as "irrelevant, however important from an economic standpoint" (a). If the Government may do this, it might have introduced no evidence, submitted to a judgment against it, and appealed; and then upon the appeal introduced by its brief to this Court, as matters of the truth and accuracy of which this Court would take judicial notice, conclusions found upon a secret inquiry by a bureau subject to no cross-examination, and with whose conclusions these defendants had nothing in the world to do. There may be something worse in bureau tyranny that

(a) Government's main brief, p. 142.

may be imagined, but these defendants cannot imagine it.

These defendants see very little injury to them in the extracts from the reports made in the Government's brief, even if they were to be considered by the Court; but having been impelled by a sense of the unfairness of such to characterize as an impropriety their inclusion in the Government's brief, it becomes the duty of this brief to demonstrate the justice of this characterization even at a length which the practical importance of the matter would not warrant.

Identically such reports have never been considered by the Courts of any land in which Anglo-Saxon institutions obtain, because it is not to be forgotten that the reports of the Bureau of Corporations were not reports dealing with a general subject, but dealing with this identical company which is here the defendant in a quasi-criminal proceeding, and that the effort of the Government is to have taken as facts against it conclusions reached by the agents of the plaintiff in an extra-judicial and one-sided examination of its affairs. It has been held by the overwhelming weight of authority, though, that such reports, even if they dealt in matters of general note and interest and did not concern themselves only with the affairs of the particular individual or corporation under investigation, will not be thus noticed by the Court, and that the so-called facts contained in them will not be taken as facts unless regularly proven where both sides may examine and cross-examine. In *Bank* v. *Chapman* (a) upon writ of error to the Supreme Court of Florida, this Court

(a) 173 U. S., 205, 217. This decision was not induced by the fact that the case came from the highest Court of the State, and that this Court felt bound to follow the decision of the State Court. See *Coffee* v. *Groover* (123 U. S., 1), and what is said of it in *Jones* v. *U. S.* (137 U. S., 202, 215).

refused to take judicial notice of the contents of the report of the Auditor of Florida because

> "We do not think it is a document of which we can take judicial notice, or that we could refer to any statement or alleged fact therein unless such fact were embraced in the findings of facts of the trial Court upon which we must decide this case."
>
> "Applying the foregoing principle to the recitals and findings contained in the report of the committee appointed to investigate the cause of the missing roll-call to S. B. No. 87, we cannot say that such recitals were competent evidence to prove the fact in issue. To so rule would be a dangerous doctrine, and might prove far reaching in its effects. Many matters come under the investigation of the Legislature which are usually referred to committees who make reports of their findings and conclusions. If a rule should be adopted by this court making the printed journals of the two houses of the Legislature conclusive evidence of the recitals and findings of the committees of such bodies appointed to investigate questions of fact which may be the subject of investigation by such bodies, as we are asked to do upon the record presented in this case by appellee, the result might be disastrous in the extreme" (a).
>
> "Of private and special facts, in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge. * * * This power (to take judicial notice of facts of universal notoriety) is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative" (b).

(a) Rio Grande Co. *v.* Catlin (Col.), 94 Pac. Rep., 323; See also Redd *v.* Supervisors, 31 Gratt (Va.) 695, 709; State *v.* Dow, 53 Me., 305

(b) Brown *v.* Piper, 91 U. S., 37, 42.

> "It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon the facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages" (a).

If the question were one of the Year Book of the Department of Agriculture, alone, it might be conceived that the Government had fallen into the error of not distinguishing between public documents of which the Court takes judicial notice *suo motu*, and those which are evidence of the facts contained in them when regularly introduced in the cause. As to this latter class of documents, this Court has cited with approval the language of Gresley on Equity Evidence:

> "It will not point out their applicability nor call for them, but if they are once put in by either party it will investigate them, and will bring its own judicial knowledge to supply or assist their proof, and will then adopt them as its own evidence independently of the parties" (b).

This Court in the same case, in distinguishing between the judicial notice which the Court will

(a) Chief Justice Marshall in U. S. *v.* Wilson, 7 Pet., 150, 161.

(b) Duncan *v.* McCall, 139 U. S., 444, 457.

give to a statute, and the admissibility in evidence of a legislative journal, says that the latter—

> "Should be so presented that the adverse party may have opportunity to controvert the allegations and to prove by the records due conformity with Constitutional requirements."

We are not unmindful that this Court has taken judicial notice of facts contained in documents in the Department of the Interior and the decisions of that Department, and surveys made under its order, so far as they relate to public lands (a), and that it has also taken judicial notice of facts contained in documents in the Department of State so far as they concern the sovereignty or status of any foreign territory (b), but this is only because this Court is bound by such decisions and surveys of the Department of the Interior, and the position taken by the State Department with reference to foreign territory.

The distinction attempted by the Government to be drawn between this case and the Knight case does not exist, as an examination of the Government's Petition in the Knight case fully demonstrates.

No attempt has been made to distinguish the actual tangible facts of this case and the facts of the *Knight case;* any distinction between the cases is in favor of these defendants because the Attorney-General in answering Mr. Justice Day with reference to the acquisition of coal, recognized that

(a) Heath *v.* Wallace, 138 U. S., 573; Knight *v.* Land Assn., 142 U. S., 161; New York Indians *v.* U. S., 170 U. S., 1.

(b) Jones *v.* U. S., 137 U. S., 202; Underhill *v.* Hernandez, 168 U. S., 250; The Paquete Habana, 175 U. S., 677.

there is a distinction in the proper treatment by the law of necessaries such as coal and sugar and luxuries like tobacco; again, the proportion of the sugar business acquired by the defendants in the *Knight case* was much greater than that of tobacco acquired by the defendants in this case.

The distinction that has been suggested by counsel for the Government, or otherwise, that would, as the Government claims, reconcile a decision by this Court at this time against these defendants, with the decision that this Court has heretofore made, in the *Knight case*, upon which these defendants and business men all over the country have relied as the law, is that the scope of the pleadings in the *Knight case* was so narrow as not to allow the admission of proper evidence showing the purpose of the defendant to gain control of interstate trade in sugar, or to permit the granting of what the Government now says would have been the proper relief. The allegation of the bill and the finding of facts adopted by this Court in the *Knight case* were that the American Sugar Refining Company, by these purchases, intended and had the purpose—

> "To obtain a greater influence or more perfect control over the business of refining and selling sugar in this country" (a).

The Government in the case at bar cannot put its claim into more apt and inclusive words than that these defendants have been actuated by the purpose—

> "to obtain a greater influence or more perfect control over the business of manufacturing and selling tobacco products in this country."

The record of the *Knight case* is on file in this Court, and we cannot comprehend how one

(a) 156 U. S., 1, 6.

having read that record is able to argue that the failure of the Government in the *Knight case* was due to the restricted scope of the bill filed. The bill alleges that the four independent companies whose stock had been acquired by the American Sugar Refining Company were before the sale in competition with the said American Sugar Refining Company and with one another in the business of refining sugar, and that the products of their refineries were sold and distributed among the several States of the United States, and that all said companies were engaged in trade and commerce with the several States and with foreign nations; that the American Sugar Refining Company, in order that it might obtain complete control over the product—

> "and price of refined sugar, entered into an unlawful scheme to purchase the stock, machinery and real estate of the other defendants, by which they attempted to obtain control of all the sugar refineries in that district *for the purpose of restraining the trade thereof with other States as theretofore carried on independently by said defendants*" (a). (Italics ours.)
>
> "That the said contracts were made by the American Sugar Refining Company and the other defendants *for the purpose* of enabling defendant, the said American Sugar Refining Company, to control the manufacture and price of sugar, and to limit the production and increase the price of the same, *and to restrain the trade in said commodity by and between the State of Pennsylvania and the other States of the United States and with foreign nations*" (*b*). (Italics ours.)

That the defendant, the American Sugar Refining Company, monopolized the manufacture *and sale* of refined sugar in the United States, and is enabled to control at will the prices of said sugar,

(a) Page 5 of printed record in the Knight case.

(b) Page 7 of printed record in the Knight case.

and *does control and regulate the prices of refined sugar in the United States;* that the said contracts were part and parcel of a fradulent scheme to enable the American Sugar Refining Company to obtain the control of the production and price of refined sugar, and were—

> "combinations in restraint of trade, and that in making said contracts the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations; and that said contracts were made *with the intent to enable the American Sugar Refining Company to monopolize the manufacture and sale of refined sugar in Pennsylvania and among the several States of the United States*" (a). (Italics ours.)

In view of these extracts, and others that might be made, it seems to these defendants unjust to counsel who in that case represented the Government, and unjust to this Court, to say that this great case turned upon a question of restricted or extended pleading. The petition presented the views of counsel for the Government as then held, and as now, after their repudiation by this Court, and years of governmental inactivity, are again held and made in this Court, by counsel for the Government, quite as fully and quite as skilfully as the petition in the case at bar; the petition specifically prayed the relief that was the very ultimate purpose of the decree of the Court below in the case at bar, to wit: the rescission of executed contracts of purchase and the restoration so far as possible of the pre-existing *status quo.*

All of the averments of the bill are, of course, not set out in the opinions of the Court, but they all appear in the record in this Court, and that they were all considered by the Court is shown equally by the opinion of the Court delivered fully and

(a) Page 7, printed record of Knight case.

clearly by the Chief Justice, and the exhaustive dissenting opinion of Mr. Justice Harlan. It was at the very beginning of this opinion that the Chief Justice said:

> "The bill charged that the contracts under which these purchases were made constituted a combination in restraint of trade, and that in entering into them the defendants combined and conspired to restrain trade and commerce in refined sugar among the several States and with foreign nations, contrary to the Act of Congress of July 2, 1890" (a).

It is unnecessary, as it would be an improper imposition on this Court, to repeat the argument in the main brief; an examination of the cases there cited shows that the *Knight case,* as stated by subsequent decisions of this and lower Federal courts, has never been conceived to have turned upon a matter of pleading. It has always been recognized as having rested upon the fundamental distinction between commerce and production, and to be a declaration by this Court of the proper limitation of the power of Congress under the Commerce Clause of the Federal Constitution.

Power—Considered as a Matter of Law and as a Matter of Fact.

It has been contended by the Government that when one comes to the second section of the Sherman Anti-Trust Act, that section which forbids the monopolizing or attempt to monopolize any part of interstate trade or commerce, that there must be considered not only the conduct of defendants, but their power. Counsel for the Government are not entirely definite and agreed as to whether the

(a) 156 U. S., 1, 9.

power that they claim is condemned by the statute is a power to regulate prices to consumers and from producers, or a power to exclude competitors. The first of these aspects, to-wit: the alleged power to regulate prices to consumers and from producers, has been considered in the main brief. Except as it is incidental in a discussion of the alleged power to exclude competitors, it will not be further argued.

The first thing to be said of this contention is that it is a singular theory of criminal law, and, after all, the Sherman Anti-Trust Law is a criminal statute, that men are to be punished for having the ability to commit a crime, as if they had actually committed it. In the second place, it is to be said that such power of monopolization as these defendants have, is only the power that is inherent in wealth, whether that wealth is held by an individual or a corporation. The Attorney-General in his oral argument recognized the vitality and difficulty of the question of Mr. Justice Brewer as to whether there would be a violation of the second section of the Sherman Law by an individual who had accumulated the very wealth and the very power in the tobacco business that these defendants have. But recognizing, as the Attorney-General must have done, the vital and searching nature of this question, he confessed his utter unwillingness to say that such an individual would, by the accumulation of such power, violate this law. *But the Sherman Law expressly makes its own provisions applicable equally to a natural person and a corporation. The Act cannot be construed one way as against a corporation, and another way as against a natural person.*

This theory of condemnation for possession of power which the Government seeks to apply to corporations, but which has equal application to individuals, would exclude a moderately

rich man from any participation in any trade the volume of which is small, and a very rich man from any trade. These defendants could be of temporary injury to competing tobacco manufacturers by committing the great folly of spending their surplus in the purchase at exorbitant prices of all the leaf tobacco on the market; but, in the same way, they, or any other rich manufacturer, could injure the manufacturers of cotton by buying all the available cotton; and in just the same way, if their wealth is as reputed, Mr. Rockefeller or Mr. Carnegie could do the same thing to manufacturers of either cotton or tobacco. Are the rich, on account of this inherent power, to be forbidden to exist—rich corporations dissolved, and rich individuals banished from life or trade? Is the second section of the Sherman Law aimed at success? If so, we must forego our fight for the world's markets, because it is only those who are successful at home and accumulate such power as to enable them, if they see fit, to adopt a suicidal policy, to injure others in the trade, that will ever carry the American flag into foreign commerce. The testimony in this record of the difficulties of building up a foreign business —the organization employed, the steamboats chartered, the losses incurred, the obstacles overcome— shows beyond peradventure that if by the second section of the law there is forbidden the continued trading of a rich individual or corporation, there is forbidden, with even more emphasis and effect, the doing by America of foreign trade (a).

As a matter of fact, though, there exists no business in which the mere power of wealth is so limited—the mere expenditure of money so futile— as the tobacco business. Of course, large capital has its advantages, and, of course, small capital has its disadvantages in the tobacco, as in every other business; the manufacturer who should sell goods

(a) Record, Vol. II, p. 69 *et seq.*

at or below cost, though, in an effort to drive out "Bull Durham," or Bloch's Scrap tobacco, or Schinasi's cigarettes, or Pierson's snuff, or some one of Scotten-Dillon's successful brands, would find, after an expenditure of millions, that the brand that was being thus fought had only become the stronger by the fighting. A man who smokes tobacco pays five or ten cents for a package; it is exactly what he wants; he has been smoking it constantly and he prefers to go right on getting a package of the same size he is used to, of the identical goods he is used to getting, and paying the same price he is used to paying. It is conceivable that a cut in the price of sugar of a cent a pound, or of oil of a cent a gallon, would drive out the goods of competing sugar or oil refineries; but a cut in the price of tobacco or its products has no such effect (a). Again, if there exists local competition against a large sugar refiner, or oil refiner, in Philadelphia, for instance, he can cut his price there without affecting his price in New York or elsewhere. With tobacco, it is not so, for the item of transportation is of so little comparative importance in the tobacco business that if these defendants attempted to undersell in one section of the country, and recoup their losses by excessive prices in other sections, the goods would flow in an irresistible stream from the low-priced to the high-priced territory, nullifying the scheme or bankrupting the manufacturer (b).

Besides this general nature of the business, things in the record show this want of power on the part of these defendants. *Now it is not, and has never been, the policy of these defendants to require contracts from their customers that provide for exclusive handling, or to fix or in any way limit the prices at which their customers shall dis-*

(a) Rec., Vol. IV, p. 397; Vol. IV, p. 424; Vol. IV, pp. 510-512.

(b) Record, Vol. III, p. 278.

pose of their products. It ought to be remembered by this Court that while the case of *Whitwell* v. *Continental Tobacco Company* (a) would indicate that that company had a plan that contemplated exclusive handling, that case was tried upon demurrer to a complaint which alleged a selling scheme, which scheme, as alleged by the plaintiff, was tantamount to requiring exclusive handling; the case was decided for the defendants upon demurrer, and the actual facts were never in that case gone into. The record in this case justifies the statement that there was no such scheme involved, and that the complaint was untrue in alleging that customers were required or induced to handle the goods of Continental Tobacco Company to the exclusion of competitors. Early in 1904, though, The American Tobacco Company and Continental Tobacco Company, for the first and last time in their history, put a selling plan into effect in New England and in Philadelphia, which contemplated a maintenance of price by the jobbers, and the payment of a special commission to those jobbers who confined their business to the goods of these two companies. It is not necessary to defend the propriety of that selling plan, either in its maintenance of price, or in its provision for exclusive handling, because *it was definitely and permanently abandoned in the fall of 1904, nearly three years before the institution of this suit, and no such plan is even alleged to have ever existed before or since.* The plan was put on, though, at the instance of the jobbers themselves, who sought in this way to be protected against their own price cutting. The ineffectiveness of the plan is proof positive of the lack of power of these defendants. Retailers, and, of course, consumers, were not affected by the plan at all, and they had absolutely no difficulty in doing business in Phila-

(a) 125 Fed. Rep., 454.

delphia or in New England, or in securing all of the products of any manufacturer they desired; and these defendants deliberately abandoned the plan in November, 1904, not because of its illegality or impropriety, but because it was a poor trade scheme, and resulted in their getting less of the business, and their competitors more of the business, in the localities in which it was tried, than under the conditions that before that, and since that, have prevailed.

Another circumstance which has been stressed by the Government, and was mentioned in the oral argument in this case, is the method by which some of these defendants market their products in the City of New York, namely, through the medium of only one jobber, the Metropolitan Tobacco Company. It should be mentioned at the outset that this does not apply to all of the defendants, or even to all of those of which The American Tobacco Company owns the entire share capital—American Cigar Company and some of the cigarette manufacturing companies sell to Metropolitan Tobacco Company and other jobbers in New York alike. It should not be forgotten also that none of these defendants now owns, or has ever owned, any stock in this Metropolitan Company, or has been interested in it in any other way whatever. (a) As appears from the testimony of the president of the Metropolitan Tobacco Company, introduced by the Government, the Metropolitan Company was an idea suggested and worked out by him, without either the aid or co-operation in any way of any of these defendants (b). It was not a method evolved by any of these defendants for the marketing of its goods. We have been referred to no case which holds that it is a violation of this Act for a corporation to give one jobber the exclusive handling

(a) Rec., Vol. III, p. 272.
(b) Record, Vol. III, p. 256.

of its output in any one locality. On the contrary, it has been expressly held that this Act does not so provide (a). And certainly the record is barren of any evidence that the effect of this exclusive agency in the City of New York has been to hurt either the independent manufacturers, other jobbers or the retail trade. The Metropolitan Company has always handled the goods of independents as well as the goods of these defendants (b), and it is shown that the sales of this Metropolitan Company to other retail stores than those of the United Cigar Stores Company have increased each year, and the number of retail customers has also increased (c). It also appears from his testimony that there are some forty other tobacco jobbers doing business in the City of New York, though, of course, the business done by some of them is small (d). The person upon whose testimony the Government has placed reliance is Albert H. Hillman, a large jobber in the City of New York, whose hostility to these defendants is abundantly shown by his declaration that he refuses to handle the products of any of them; but even Mr. Hillman, with all this bias, was forced on cross-examination to admit that there were certainly five other tobacco jobbers in the City of New York (not to mention Park & Tilford and Acker, Merrall & Condit Company, and other wholesale grocers), whose sales of tobacco and its products are considerable, who are doing well, that his own business is prospering (e), and that there are brands of independent manufacturers competing with every brand sold by these defendants, and they can be secured in New York City at simply a

(a) U. S. *v.* Joint Traffic Asso., 171 U. S., at p. 567; Whitwell *v.* Continental Tob. Co., 125 Fed., 454; *post*, pp. 33-4.

(b) Record, Vol. II, pp. 300-301, 398; Vol. III, pp. 269-270.

(c) Record, Vol. III, pp. 274, 275.

(d) Rec., Vol. III, p. 272.

(e) Rec., Vol. III, pp. 493, 510.

competing price (a). Mr. Hillman also stated what is a very important fact in this connection, that certainly eighty, and possibly ninety per cent. of the tobacco products sold in the City of New York consist of cigars and cigarettes, the business in snuff and plug tobaccos being inconsiderable, and that of smoking tobacco not a very large per cent. (b). But cigars and cigarettes are the two forms of tobacco products of which these defendants sell a less percentage than any other. No one, considering these facts, and, in addition, the evidence of D. A. Schulte of the growth of his own business, and that of other retailers; of George P. Butler concerning the growth of the business of Butler-Butler, whose products were largely sold in the City of New York, and of the Schinasi Brothers, of whom the same thing is true (c), can believe that by the use of this one jobber by some of these defendants for marketing their products in the City of New York, there has been acquired any power of monopolizing or restraining trade in tobacco in that city.

Another thing strikingly shows a want of power in these defendants to exclude others from the trade: There is testimony of wholesale dealers in the record; several of these are wholesalers who receive from The American Tobacco Company the special concession on their purchases which The American Tobacco Company pays to a few wholesalers for special work; these dealers know, and have known all the time, that the defendant tobacco companies own the American Cigar Company, and yet several of them have dealt very little with, and several more none at all with, the Cigar Company. What is the reason? Is there any grave fear on the part of these dealers of The

(a) Rec., Vol. III, p. 497.
(b) Rec., Vol. III, p. 492.
(c) Record, Vol. III, pp. 473, 575; Vol. IV, pp. 661, 664.

American Tobacco Company? If so, it is strange that they do not handle the cigars in which they know the Tobacco Company is interested. Why didn't the Tobacco Company use the power which it is alleged the payment of this inside concession gave them over jobbers, to force upon these jobbers the cigars of The American Cigar Company? The answer is easy: There did not exist the power to force upon the trade cigars of a kind or brand consumers did not want, and the defendants would have been foolish to have attempted to use any power that they are assumed to have had over the jobbers in that direction, and the jobbers would have resented and successfully resisted any such atempt to use the power.

The truth is, in the tobacco business, more than in any other business, the consumer is the autocrat and the only autocrat of the trade. There exists no prosperity for a tobacco manufacturer except as the favor of the tobacco-consuming public gives it to him. In every store, side by side, with every brand manufactured by these defendants, there are brands of the so-called independent manufacturers. The consumer takes his choice. The brand that he desires will be furnished him by the retail dealer at the risk of losing the consumer's trade; the brand that the retailer wants will be furnished by the jobber at the risk of losing the retailer's trade. So, after all, there exists no power on the part of these defendants to oppress even the tobacco consuming public. They may fix the prices, it is true, but only of their own product, and if the consumer feels that he is being imposed upon; that his attachment for a particular brand is being presumed upon, and that its quality is going down, or its price going up; he has the remedy in his own hands.

Consideration of Decisions not Considered, or inadequately Considered, in the Main Brief of these Defendants.

I.—*Shawnee Compress Co. v. Anderson* (a) was a case arising in the Territory of Oklahoma. Notwithstanding the fact that it arose in a territory where the jurisdiction of Congress is absolute, and no question could arise involving the distinction between Congressional control of interstate trade and State control of intra-state production (b), the Government at the argument seemed to rely upon it. The suit was brought by minority stockholders of the Shawnee Company to cancel a lease made by that Company of all its property to the Gulf Company, as illegal, and cancellation was decreed by the lower court, but whether because this lease violated the common law, or the Sherman law, or the statutes of Oklahoma, this Court said that it was unable to say. It appeared that one Hanson was the President of not only the Gulf Compress Company, but of the Atlanta Compress Company, and a stockholder in each, and that this latter company was organized, owned and controlled by railroads operated in the States of Alabama, Georgia and Florida, in which State this Atlanta Company controlled the operation of twenty-five compressing plants. It further appeared that the Gulf Compress Company was a close corporation, operating in Alabama, Mississippi, Tennessee, Louisiana, Arkansas, Indian Territory and Oklahoma some twenty-seven compresses, located at various points, but that none of the Gulf Company's plants or the Atlanta Company's plants were operated at

(a) 209 U. S., 423.

(b) Railway Co. *v.* Gutierrez; opinion by Justice Day, delivered November 15, 1909.

the same point. It further appeared that the railroads pay for the compression of cotton, incorporating the cost thereof in their tariff, and that these railroads had so arranged the tariffs for the hauling of cotton, as well as the hauling districts or territories, as to render it unprofitable to haul cotton within those districts to any other points than those at which the compresses of either the Atlanta Company or the Gulf Company were located, a higher rate being exacted when the hauling was to any other point. It was unquestionably in view of these higher rates and hauling districts, which showed a scheme on the part of the railroad companies to give these companies a monopoly of the compressing business, taken in connection with some of the covenants of the lease in question, that this Court found in the transaction attacked "something more than the acquisition by the Gulf Company of another compress—or an addition to its business," namely, "acts in aid of a scheme of monopoly." But in this finding the Court is strictly within the definition of monopolizing urged in our main brief, because these discriminating rates constituted an exclusion by an illegal means; it has always been considered that discriminating rates gave a cause of action at common law to those damaged thereby (a). This is in addition to the fact that a cotton compress plant, operated in connection with the transportation of cotton, is affected with a public interest, as are grain elevators and the like (b).

II.—*United States v. Standard Oil Co.* (c) is a decision by the Circuit Court of the Eighth Circuit, and the case is on appeal to this Court. It would perhaps not be proper, under these circum-

(a) Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S., 92.
(b) Munn *v.* Illinois, 94 U. S., 113.
(c) 173 Fed., 177.

stances, to cite the decision as an authority to this Court, but following the example of the Attorney-General in his oral argument, it is perhaps not improper to quote from the opinions in order to obtain the opinion of two eminent judges on a matter of legal definition involved in this case:

> "If the second section of the act prohibits every attempt to monopolize any part of interstate commerce it forbids all competition therein, and defeats the only purpose of the law; for there can be no competition unless each competitor is permitted to attempt to draw to himself, and thereby to monopolize, some part of the commerce. This is not, it cannot be, the proper interpretation of this section. It must be so construed as to abate the mischief it was passed to destroy and to promote the remedy it provided. It was enacted, not to stifle, but to foster competition, and its true construction is that, while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts." (a)

> "Magnitude of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize. To offend the act the monopoly must have been secured by methods contrary to the public policy as expressed in the statutes or in the common law. The wrongful element in a monopoly under the act is not necessarily the violation of some penal statute, but may consist of other acts or conduct which the law condemns and the benefit of which, if sought in a civil court of justice, could not be obtained. . . . During the discussion of the amendment above referred to,

(a) Opinion of Judge Sanborn, p. 191.

> apprehension was expressed over the broad language of the second section of the proposed act, and inquiry was made whether the committee having the bill in charge intended it should make it an offense if an individual engaged in interstate and foreign commerce, 'by his own skill and energy, by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade.' Assurances were given that the term 'monopolize' had no such signification, but that it contemplated the employment of means which prevented others from engaging in fair competition, the engrossing of the trade, and the like. Undoubtedly this view prevailed at the passage of the law" (a).

III.—*Union Pacific Coal Company* v. *United States* (b) was a criminal case decided by the Circuit Court of Appeals of the Eighth Circuit, opinion by Circuit Judge Sanborn, delivered November 19, 1909, in which the defendants were indicted and had been convicted of entering into a combination to force a dealer in coal to maintain prices that he charged for coal by refusing to sell and to transport to him any of the coal mined by them unless he would maintain such prices. The conviction was reversed and the whole opinion is interesting. We desire, however, to quote only the following words:

> "If the necessary effect of a combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law (Citing cases). There are lawful and unlawful combinations of persons conducting interstate and interna-

(a) Opinion of Judge Hook, pp. 195, 196.
(b) 173 Fed., p. 737.

tional commerce, and undoubtedly the former vastly outnumber the latter. There is no presumption that two or more persons who have combined to conduct interstate or international commerce are guilty of a combination in restraint of that commerce" (a).

IV.—*Arkansas Brokerage Co.* v. *Dunn & Powell* was a case decided by the Circuit Court of Appeals of the Eighth Circuit in October, 1909, Circuit Judge Adams delivering the opinion. It has not yet been reported. In that case it appeared that the plaintiff had built up a lucrative business in Pine Bluff by negotiating sales of merchandise between manufacturers and wholesale dealers of other States on the one hand, and jobbers doing business in that region on the other; in the year 1906 the defendants, constituting substantially all the jobbers in Pine Bluff, concluded to organize and did organize a corporation to do their own brokerage business, as well as that of any others which it might secure; these jobbers owned the stock of the company, and the effect of the arrangement was that the plaintiff and other merchandise brokers in Pine Bluff were put out of business. The Court denied the plaintiff any relief although it conceded the action taken by these jobbers in thus organizing this brokerage house which they owned, and thereafter giving it their business, was an act direct in its effect on interstate commerce.

> "It cannot be doubted that the five jobbers could have given their brokerage business to any broker on terms to be agreed upon, and it seems equally clear that by participating in the organization and ownership of a brokerage company they did no more than this, if, indeed, as much; for there was no obligation, express or implied, requiring them to deal with the brok-

(a) 173 Fed. at p. 740.

> erage company excepting so far only as their best interests from time to time dictated."

V.—*Wheeler Stenzel Co.* v. *American Windowglass Co.* (a) is a case in which the Supreme Judicial Court of Massachusetts in June, 1909, had occasion to consider the alleged infraction of the Sherman Law by transactions engaged in by the National Windowglass Jobbers Association; this National Windowglass Jobbers Association bought windowglass for the members of the Association, in part for the express purpose of eliminating the competition between them. The Supreme Judicial Court of Massachusetts, speaking through Justice Morton, declined to condemn this transaction, saying in part:

> "But by enabling those contracting with it to buy windowglass on more advantageous terms, it would seem that the arrangement tended rather to encourage than to monopolize interstate trade or commerce. The free flow of commerce between the States is not interfered with directly at least, in any manner, and it is plain, we think, that neither at common law nor under the Sherman act was or is there anything unlawful in contracts relied on or in the circumstances under which they were entered into."

The opinions in these last three cases are careful and well considered; the last case goes further, though, than it is necessary for this Court to go to uphold the validity of transactions shown by this record and attacked by the Government, such, for instance, as the use by several of the defendants of Amsterdam Supply Company as a common purchasing agent. These opinions by Circuit Judges Sanborn and Adams and Supreme Court Justice Morton are only other and persuasive authorities

(a) 89 N. E. Rep., 28.

for the principle that co-operation is not violative of any law—it is only when such co-operation becomes direct restraint of interstate trade that it is amenable to the Sherman Anti-trust law.

Indefiniteness and Confusing Contradiction in Government's Contentions of the Law of this Case.

These defendants do not contest the correctness of the declaration of counsel for the Government that there is no duty upon the Government in the argument of a given case said to be under the Sherman law to define all of the limits and boundaries of that law. These defendants do contend, though, that so far as it is contended that the law applies to the given case the contentions of the Government should be definite, logical and self-consistent; nothing less is due to the court and to these defendants.

Notwithstanding the fact that the Government's main brief distinctly repudiates the opinion of Circuit Judge Lacombe rendered under the first section of the Sherman law, which forbids contracts, combinations and conspiracies in restraint of trade, these defendants are unable to see the difference betwen the last contentions of the Government and the opinion of Circuit Judge Lacombe. In the main brief of the Government (a) it is said that "we do not maintain that restraint of commerce is denounced by the Sherman Act unless it is *direct* and *material*," but there is nothing in the first section of the Sherman law that warrants the amendment suggested by the Government involved in the insertion of the word *"material."* If, as decided by this court after the fullest consideration, in which the court was aided by the most eminent counsel, this court declined to read into that section of the Act the word *"reasonable,"* by what author-

(a) Government's Brief, p. 28.

ity does the Government now propose to read into that section the much more indefinite word "*material*"?

In the oral argument of the Attorney-General no further progress is made toward consistency, nor toward the substitution of another construction of the first section of the Sherman law for Judge Lacombe's; indeed, the Attorney-General discards the word "material" as a proper amendment of the first section and introduces the idea of "*purpose*"; he said, in answer to questions of Mr. Justice White, that if two grocers doing an interstate business form a copartnership, which formation has as one of its purposes the elimination of competition theretofore existing between them, that copartnership is illegal. In view of the fact that every partnership between those theretofore competitors has for one of its unquestioned purposes—whether its primary purpose or not—the elimination of the competition theretofore existing, we are brought right back to Judge Lacombe's decision.

So far as the first section of the Act is concerned, therefore, these defendants contend that the Government has not evolved a theory that does not condemn every partnership or corporation, however large or however small, formed by those previously in competition.

The Government's contentions with respect to the second section of the law are no more consistent and definite than with respect to the first. The Government has said that the restraint of commerce denounced by the Sherman Act is not condemned unless it is *direct*, and yet upon the next page of their brief they say that "combinations which give power to restrain commerce or necessarily tend to monopoly are unlawful without more" (a). But the second section of the law,

(a) Government's Brief, p. 29.

aimed at monopolizing, applies to individuals as well as to corporations, and the combination, that is, the partnership or corporation, the formation of which merely gives, or which itself only has power to work a given effect is by a strange use of words said to be *direct* in that effect. What man or corporation can know when he must cease efforts to increase his trade lest he become so large as to bring upon him the condemnation of law, if the law is as indefinite as the Government contends? If *acts* are to be condemned these defendants and business men of the country may know what acts they dare not do; surely power is too vague and uncertain a thing for judicial condemnation; surely purpose, especially when that purpose is imputed to what are undoubtedly ordinary legal transactions, such as purchase and sale, is too uncertain and vague a thing to be condemned.

> "It is equally clear that Congress has no jurisdiction over and cannot make criminal the aims, purposes and intentions of persons in the acquisition and control of property which the States of their residence or creation sanction and permit" (a).

If the Government in its suggestion of the word "*material*" means to suggest that that word is to be read into the second section as well as the first, how does the Court reconcile this Government interpolation of "*material*" with the Congressional words that forbid the monopolization of "*any part*" of interstate trade or commerce? The two expressions are utterly inconsistent, and the Court cannot hesitate to adopt the Congressional expression, rather than the interpolation or substitution of Government's counsel.

In short, counsel for the Government have given no undeviating, consistent theory of the law as

(a) Circuit Judge Jackson *In re* Green, 52 Fed., 104, 112.

they understand it, which is not utterly destructive of all business, so far as the first section of the law is concerned; and not utterly paralyzing to all business by its indefiniteness and uncertainty so far as the second section is concerned. As to both sections the theory of the counsel for the Government is certainly destructive of the control of the States over matters of purchase, sale and ownership of property within their borders.

Respectfully submitted,

JOHN G. JOHNSON,
WM. J. WALLACE,
W. W. FULLER,
DE LANCEY NICOLL,
JUNIUS PARKER,
Of counsel for these defendants.

APPENDIX.

1903.

		Pounds.
Leaf tobacco purchased by defts. (except Imperial Tob. Co.), (Vol. V, Ex. 76)		391,836,264
Crop of seed leaf (brief, p. 179)		180,000,000
Exported (Com. & Nav. of U. S., 1906, p. 750)		311,971,831
Total		883,808,095
DEDUCT:		
Exports by British-American Tobacco Company because included in both purchase and exports above (Vol. II, p. 72)	20,179,955	
Purchases of seed leaf by American Cigar Co. (Vol. V, Ex. 76) because included both in purchases and seed leaf above	23,997,151	44,177,106
Making total bought by defts. and exported		839,630,989
Government's estimate, Year Book 1908, p. 680		815,972,425
Showing that the Government's estimate is less than that actually bought by defts. and exported without allowing anything for purchases by independent manufacturers such as Peper, Bloch, Scotten-Dillon and others. Mr. Yuille's estimate is 998,365,907 (Vol. V, Ex. 76), which leaves 158,734,918 for these independent dealers.		23,658,564

1904.

		Pounds.
Leaf tobacco purchased by defts. (except Imperial Tob. Co.) (Vol. V, Ex. 76)		329,633,806
Crop of seed leaf (Brief, p. 179)		180,000,000
Exported (Com. & Nav. of U. S., 1906, p. 750)		334,302,091
Total		843,935,897
DEDUCT:		
Exports by British-American Tobacco Company because included in both purchase and exports above (Vol. II, p. 72)	22,200,767	
Purchases of seed leaf by American Cigar Co. because included both in purchases and seed leaf (Vol. V, Ex. 76)	22,851,997	45,052,764
Making a total bought by defts. and exported		798,883,133
Government's estimate, Year Book 1908, p. 680		660,460,739
Showing that the Government's estimate is less than that actually bought by defts. and exported without allowing anything for purchases by independent manufacturers such as Peper, Bloch, Scotten-Dillon and others. Mr. Yuille's estimate is 842,145,143 (Vol. V, Ex. 76), which leaves 43,262,010 for independent dealers.		138,422,394

1905.

		Pounds.
Leaf tobacco purchased by defts. (except Imperial Tobacco Co.) (Vol. V, Ex. 76)		418,429,812
Crop of seed leaf (Brief, p. 179)		180,000,000
Exported (Com. & Nav. of U. S., 1906, p. 750)		312,227,202
Total		910,657,014
DEDUCT:		
Exports by British-American Tobacco Co. because included in both purchase and exports above (Vol. II, p. 72)	27,756,889	
Purchases of seed leaf by American Cigar Co. because included both in purchases and seed leaf above (Vol. V, Ex. 76)	31,080,663	58,837,552
Making total bought by defts. and exported		851,819,462
Government's estimate, Year Book 1908, p. 680		633,033,719
Showing that the Government's estimate is less than that actually bought by defts. and exported without allowing anything for purchases by independent manufacturers such as Peper, Bloch, Scotten-Dillon and others. Mr. Yuille's estimate is 921,344,354, which leaves 69,524,892 for these independent dealers.		218,785,743

IN THE

upreme Court of the United States.

316.

THE UNITED STATES OF AMERICA,

Petitioner-Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,

Defendants-Appellees.

317.

THE AMERICAN TOBACCO COMPANY AND OTHERS,

Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

AL ARGUMENT OF JOHN G. JOHNSON, ESQ., FOR THE DEFENDANT HE AMERICAN TOBACCO COMPANY AND CERTAIN OTHER DEFENDANTS-APPELLEES IN THE FIRST OF SAID APPEALS AND APPELLANTS IN THE SECOND.

Evening Post Job Printing Office, 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Petitioner-Appellant, AGAINST THE AMERICAN TOBACCO COMPANY and others, Defendants-Appellees.	No. 316.
THE AMERICAN TOBACCO COMPANY and others, Appellants, AGAINST THE UNITED STATES OF AMERICA, Appellee.	No. 317.

Oral Argument of John G. Johnson, Esq., for the Defendant The American Tobacco Company and Certain Other Defendants—Appellees in the First of said Appeals and Appellants in the Second.

Mr. JOHNSON said: The American Tobacco Company was organized before the Sherman Act for the manufacture of smoking tobacco, cigarettes,

and other matters of tobacco. It was organized originally by the merger of five corporations. That took place antecedently to the Sherman Act; and antecedently to that Act it was in the possession of a percentage of the cigarette manufacturing industry considerably larger than it now possesses. It is a purely manufacturing company, selling its manufactured product. It does not engage in selling generally. From time to time it has enlarged its operations, for reasons stated in the proof and uncontradicted by proof, in order that it may manufacture more economically and more largely, and be able to sell a more largely produced product. It is not a holding company in the sense in which some of the decisions speak of a company holding merely for the purpose of holding. From time to time it acquired additional properties, always manufacturing properties, and always for purposes of its own enlargement. There is no proof whatever—on the contrary, the proof is directly opposed—that there was any acquisition at any time of any property other than for the furtherance of its own business ends.

As the business of the American Tobacco Company enlarged, as a manufacturing company, it has done precisely what every great manufacturer is obliged to do. In hunting for economies it has acquired the control of some of the materials—never the raw material, the leaf tobacco—but of some of the materials, and of the purchase of some of the materials. It has to some extent, but not to a large extent, endeavored to increase the facilities for the distribution of its goods. It has insured its own product. It has done, in fact, all those things which a greatly enlarged business enables a manufacturer to do in such business for the furtherance of its ends.

The question is whether that company, thus organized, thus enlarged, thus conducting its busi-

ness, is doing an illegal business? And in order that we may know exactly where we stand in the reasons which the government assigns for its business being illegal, let us take them upon their own wording, and see what they say:

"We do not maintain that restraint of commerce is denounced by the Sherman Act unless it is direct and material, either in tendency or effect; and, of course, do not insist that every contract or arrangement which causes the elimination of a competitor in interstate trade is necessarily unlawful. The statute was intended to foster, not destroy, business operations universally regarded as promotive of the public welfare.

"Accordingly, we do not avouch and will not attempt to support the extreme construction of the Act adopted by the Presiding Judge below under which he declared, in substance, that it would be unlawful for any two individuals driving rival express wagons between villages in contiguous States to combine forces by forming a partnership, or otherwise, and operate a single line; or by contract 'to deprive the country of the services of any number of independent dealers, however small.'

"Contracts, conspiracies or combinations which give power to restrain commerce or necessarily tend to monopoly are unlawful without more. The essential purpose of the statute is to prevent injury—not merely to reverse a course of conduct. The evidence, however, clearly shows that acting in concert the defendants have exercised coercion and duress and have practiced unfair, oppressive and wicked trade methods" (Brief, pp. 28-9).

I do not propose to cover the ground which my colleague covered so thoroughly yesterday, and review those things. That question of whether there are such acts—which we utterly deny—must de-

pend upon the effect of the oral argument, and upon the reading of the careful paper books which have been prepared on both sides of this controversy. What concerns me is that in that statement of the law we have inserted many things which we do not find in the statute, and we have the non-insertion of some things which we think should be there. For instance, let us take it up a little and see what it means:

"We do not maintain that restraint of commerce is denounced by the Sherman Act unless it is direct."

And yet, stating that principle that the Sherman Act only denounces restraint of commerce that is direct, we have within the compass of half a page the statement of directly destructive and antagonistic doctrine of this kind: That contracts, conspiracies, or combinations which give power to restrain commerce or transportation are condemned by the Act.

Those two things cannot stand together. It cannot be that the Sherman Act condemns only that which is a direct restraint of trade, and yet condemns that which is not a direct restraint of trade, but condemns that which may, by the possession of power, which may or may not be of illegal acquisition, have the indirect effect of restraining trade. And again—because when your adversaries attempt to state a proposition, and when that proposition is untenable, there is some inference to be drawn from it that it is difficult for them to state anything upon which they can rely with confidence—had they stated: "We stand upon the Sherman Act as it was written," we would know exactly where they stand. But when they say, in the first place, in one breath, that it must be a direct restraint, and say in the next that whether direct or indirect, if there is

the possession of the power which may result in the restraint it is condemned, I fail to see the consistency of the doctrine.

Again:

"We do not maintain that restraint of commerce is denounced by the Sherman Act unless it is direct and material, either in tendency or effect."

Your Honors decided, after a great legal controversy, conducted by the greatest legal minds or among the greatest that have adorned the bar of America, that you could not write into that statute, in connection with the word "restraint," the word "reasonable." And yet the government say that they will write into that statute the word "material," although you see nothing at all of that sort anywhere in it.

Again:

"Contracts, conspiracies, or combinations which give power to restrain commerce or necessarily tend to monopoly are unlawful, without more."

You have there the suggestion of something which has not the shadow of foundation in any wording of that statute—that combinations that have the tendency or that have the power to restrain commerce are unlawful. The statute condemns the combination in restraint of trade.

Having seen their position, and having seen that they depend in the support of that position upon material acts, and that having been argued before you and standing upon its bottom, let us see where we stand upon the consideration of this subject upon general grounds. And I will state seven propositions:

The first is that this case is ruled by the Knight decision.

The second is that the actual acquisition of property not charged with public use is not a combination, contract, or conspiracy in restraint of trade within the meaning of the Act.

The next proposition is that in the present case the fact is that the acquisition of property was not for the purpose of destroying or restraining trade, but to increase that of the acquisitors. This purpose was accomplished, and trade generally was increased.

The next proposition is that there is no duty on the part of trading or manufacturing corporations to compete. The prohibition is against their agreeing not to compete. And, therefore, if non-competition is the result of acquisition, the Act is not violated.

The fifth proposition is to state the difference in the principles involved in the case of public service corporations and in that of private corporations.

The next is that the attempt to monopolize which is condemned is one which involves more than ownership or acquisition, however extensive. It involves the idea of exclusion of others from trade through the instrumentality of some illegal act or action.

And the last proposition is that the remedy decreed in this case is one which defeats the object intended to be accomplished by the Act. The failure to prescribe a remedy which does not involve such defeating is a demonstration of the lack of intent to prohibit anything which can only thus be remedied.

Let us now take the first of those propositions; and that is that this case is ruled by the Knight decision.

There is no use, in hunting for the reason of great judicial acts, to hunt for little shreds of words here and there. In determining what is decided,

nothing is more blinding and deceptive than to hunt for occasional words. Let us face the thing which is done by the decision, and then see whether that thing by that decision done is or is not like another thing which is maintained to be legal on one side and asserted to be illegal on the other.

What was the Knight case? There a sugar refining company, which by reason of mergers and consolidations and acquisitions was in the possession of about sixty-six per cent. of the refining trade of the United States, acquired, paying for the acquisition in its own shares, the shares of stock of companies manufacturing about thirty-two per cent. of the residuum of the refining trade; and after that acquisition of the shares of stock of those companies the American Sugar Refining Company was the refiner of ninety-eight per cent. of the refining product of the country. It, of course, bought its raw sugar in foreign or internal commerce. Sugar was not raised in Pennsylvania. At the same time, as appeared by the averments of the bill and appeared by the proofs, its business consisted to an exceedingly large extent in the distribution through the channels of interstate commerce of the sugar that the selling companies refined. You therefore had the case of manufacturing corporations which could not manufacture until they had, by interstate trade, obtained the raw material; of corporations which depended for their financial prosperity upon the putting through the whole of the country, in interstate commerce, of what they held. And you held in that case that the acquisition of those shares of stock could not be the subject of any animadversion by Federal law, because it was a matter entirely within the control of the State.

In this case we have a corporation which buys its raw product in other States; which distributes, after it is manufactured, the manufactured prod-

uct in interstate commerce; but which does its business and manufacturing in various States under the laws of those States. It has acquired some of the property which it holds by reason of the giving of shares of stock. It has acquired a very considerable if not the considerable quantity of the property and shares it holds by cash payments. It is engaged in manufacturing; and the shares of stock which it has acquired are of companies whose product becomes a part of one of their departments in the avenues of business. Of course it does, as the Sugar Refining Company did, a vast amount of interstate commerce business after it has produced its product.

Can the ingenuity of man, including lawyers, define a tenable or real distinction between that case and this? It has been inveighed against. Certain of the judges of the lower courts have said that this Court has reversed itself, or has in effect destroyed its ruling. But that case, as I understand, wherever it has been referred to by a justice of this Court, after a decision has been announced, has always been stated as one which stands as the law of the land. It rests upon the firm foundation of recognizing that while the Federal right is great in its way, the right of the State is great also, and is to be respected. It rests upon no small or mean distinction. It rests upon the great principle which the Constitution of the United States was partly framed to support—the preservation of State rights, and their destruction only to the extent that it was necessary and the power was conferred to destroy the State rights in the interest of the Federal government.

Attorney General after Attorney General of the United States, from that time on, has stated that that Act does not apply to manufacturing companies, and that they are not within its control. Millions, millions of property have been acquired upon

the faith of that decision, which, as I say, has always been recognized. We have heard the voicing of discontent in other courts and in other places at that decision, and at the conferring of power upon the States, or recognizing its existence. But, long ago as that decision was rendered, there has come from the Congress of the United States no suggestion of amendment or alteration of the law.

You have a statute which, when these companies enter into the domain of Federal or interstate commerce punishes in a frightfully severe way the doing of anything violative of that Act. Why and how is it now necessary to reverse a decision upon which property rights have been acquired, and which is one of the bulwarks of the State control of State matters?

The control of the States over matters of manufacturing within their limits has always been absolute. That is not merely the result of the Knight decision, but is held by the decisions which were cited sustaining the principle. If you destroy that, where are you to stop in the encroachment? The owner of a manufactory in a State subject to the State law may do in his manufacturing as he pleases. He may manufacture; he may refuse to manufacture. As far as the Federal government is concerned, the manufacturers in the States may agree that they will not manufacture; they may agree that they will not compete; but they are not to be punished. When they are engaged in a business which is preliminary to the production of a manufactured product which, by what is done with it, becomes a subject of Federal control, they are not amenable to any law or to any objection.

In the Knight case you laid down no such doctrine as that if it was restraint of commerce it was denounced by the Sherman Act if it was direct and material; or that combinations which give the power to restrain commerce or necessarily tend

to monopoly are unlawful. You allowed the matter to stand where it was, upon the theory that until something was done which brought the manufacturers within the Federal domain they could not be controlled; that if they possessed or acquired, by reason of their manufacturing, the power to do or not to do, that was a matter that was not and could not be punished by the Sherman Act.

Cotton is almost exclusively a product which goes into interstate commerce. Suppose to-day the owners of all the cotton lands in the United States agree among themselves that they will not plant cotton. The result will be destruction of an enormous interstate commerce. But would not the United States be powerless to punish them for that agreement? They might or might not be punished by the State in which they were located. That is a matter for the State. But so far as the United States is concerned, although you would absolutely destroy, root and branch and totally, all interstate commerce in cotton, would there be any right to interfere with them? And if the right existed, would it be a salutary right? But whether salutary or not, would there be any right to interfere in any possible way with them?

The properties are acquired. The various companies located here and there in different States, acquire tobacco manufactories. They may simply not manufacture at all. Who is going to punish them? They may agree that they will not manufacture. Can you punish them under the Federal law? If they do not manufacture, all interstate commerce trade in tobacco will be destroyed; but you have not yet brought them to a position where you can subject them to Federal jurisdiction. What they do in that respect is something which can be done absolutely without regard to any animadversion that may be passed upon it by any

Federal statute. The moment that they put into the stream of interstate commerce a pound of that tobacco, in all that is thereafter done they are subject to the Federal law; and if they violate any of its provisions they are condemned by that law. Until they put it into that stream, they have the absolute and complete control of whether they will or will not.

Of course, if your Honors are with us on the first proposition, none others are necessary for us to maintain.

The next proposition is that the actual acquisition of property not charged with a public use is not a combination, contract, or conspiracy in restraint of trade within the meaning of the Federal Act.

We are not dealing in this proposition with public service corporations. We are dealing exclusively with private corporations. And concerning those corporations (and now I am away from the point I have been making, narrowing this Act as not applicable to this transaction), even though they are subject to the Federal jurisdiction in acquiring the property of competitors, no matter to what extent that acquisition may go as long as it is a *bona fide* acquisition, it is not punished by anything that is expressed in this Act.

Let us bear in mind in construing this statute—a statute which the government is only willing to construe by inserting some words and expunging others—that we are dealing with a highly penal statute. The offense is punishable by a great pecuniary fine, and is punishable by imprisonment. The person who is guilty of the offense must pay triple damages to any person that alleges and proves them. For a dollar of injury he is to receive three dollars of damages. This being a highly penal statute, the fundamental rule of interpretation of criminal statutes (which you

voiced so well in United States *vs.* Brewer (137 U. S., 278), and have several times repeated, is that they must clearly express the offense. You cannot punish men by any planting of statutes so high that they cannot be read. You cannot punish them by statutes expressed in language which cannot be understood. You must clearly express the offense which is made a crime.

Under this head I want to consider first what constitutes actual acquisition. Then I want, under the second subdivision, to consider that there is nothing in this statute, in what it penalizes, that carries with it a suggestion of any actual acquisition of property.

In defining actual acquisition in this case, I am not dealing (because the exigencies of this case do not require it) with the status of a holding corporation. A holding corporation, as I understand it, is not one which acquires property or shares for the purpose of using the same in the promoting of its trade; but it is a corporation which, having no trade, acquires shares (for it cannot acquire property) for the purpose of holding them for something not involved in the transaction of any business. And that is an act which may be good or bad, under your decisions, according to the motive and the intent.

Of course, this is not any mere holding company. This is a company which has not acquired a penny's worth of property or a dollar's worth of shares except for the purpose of putting it into its own business, and which has in every instance, under the proofs in this case, when it has acquired property, used it for the purpose of promoting its business. If it buys a manufactory for the purpose of promoting its business, and does not see fit to use that manufactory, it is not amenable to any law under the Knight decision or under the Fed-

eral statute. The Federal statutes do not compel a manufacturer to manufacture.

In determining whether a thing is or is not an actual acquisition, it is immaterial whether the company buys the property and pays for it in shares, or whether it buys the property and pays for it in cash. I am not now dealing with a mere holding company. I am dealing with a manufacturing company which buys the shares in the course of its business, for its business ends. Just now, as ever, there are different ways of paying for property acquired. A payment for property in shares of stock is just as much a payment as a payment for it in cash. If you have a mere holding company, the manner of the payment may have some bearing upon the whole subject in determining intent, etc. But where you are dealing with a company which is engaged in manufacturing, and that company is buying manufacturing properties, it matters not how it pays for them. It may be the ordinary method of payment when men contract a partnership. A, B and C are conducting separate manufacturing businesses. For some reason or other they think it well to combine their efforts, to own jointly all their properties, and to conduct them under one head. There is no payment of cash at all. The three partners, if there are three, make their respective contributions; and each takes an interest in the aggregate for an interest in the segregated thing which he puts into the aggregate. And if there can be no condemnation of the acquisition for an illegal purpose, that is precisely so where the corporation acquires what is a partnership, with immunity against personal liability beyond the contribution. There are no words in this Act which punish anything like the acquisition of ownership, even though it be the acquisition of ownership of a competitor.

The Sherman Act practically made no new of-

fense, excepting that under your decisions it wrote out immunity of "reasonable" in connection with "restraint of trade." It but made part of the criminal law of the United States the common law upon the subject. And in reaching our conclusions we are aided by that light in determining what the meaning of the statute is.

At the time this statute was made there were several things being done which help us to the understanding of the meaning of it. There were acquisitions of property. Individuals grew rich, and acquired large properties. Corporations grew prosperous, and acquired enlarged properties. No one condemned that, or put into the act or can be supposed to have put into the act the condemnation of that thing which was being universally done, by condemning combinations, contracts, and conspiracies in restraint of trade.

There were other things which were being done at that time. There were contracts entered into by the owners of different corporations—usually, and perhaps always, competitive corporations—by which one competitive company agreed with the other competitive company for a restriction upon the extent to which it would do business. It agreed to a restriction of prices. It agreed to a restriction of output. It agreed to not compete. By agreeing not to compete, it directly entered into a contract in restraint of trade. The manner in which it was done in other cases was that the controlling shares of stocks of different corporations were not changed in ownership actually, but they were vested in a person who was not the owner, who was constituted a trustee; and by reason of the vesting of the title of these shares in the different companies, this trustee was able to control the operations of all. That was the trust arrangement, and that was the combination in the nature of a trust which was practically the one

known throughout America. There were mergers and consolidations under the statutes of the different States. Those statutes began fifty years ago. It has been the policy of very many of the States of the Union to increase the capital of the great corporations, to enable them to do that larger amount of business which the experience of the modern world has shown requires more capital. They have been enabled, by mergers and consolidations, to join Companies A, B, C and D into Company X, if you please. That was as well-known as this trust combination. Will you suppose that it was the intention to render penal either the acquisition of property by its purchase, whether by shares or by stock, or the consolidation of properties under the merger and consolidation laws of the different States, by a statute which, dealing with a condemnation that the common law had put upon such things, condemned all contracts, combinations, and conspiracies in restraint of trade? Did anybody suppose, in 1890, when this statute was passed, that the corporations which had and would avail themselves of the merger and consolidation laws, whether they were competitive or not (because if they were not competitive there would be no motive to consolidate)—can anyone suppose that when this Act was passed it was intended, under these words, to condemn those things which were usually done and were the ordinary transactions of business? Is it not and was it not the duty of Congress, if they had in the recesses of their heads any such idea as that, to express it in language very different from this?

Of course, when you say "in the form of a trust or otherwise," you have a pretty large limit or scope by the word "otherwise." But it is a fair rule of interpretation that a general word following special words is to be construed somewhat in accordance with the scope of the preceding words.

"In the form of a trust"—of course it was not. "Or otherwise"—did not that mean in that form which put the properties of various corporations or individuals under a joint control or domination? And did it mean that control which followed the acquisition by any man of property in a legitimate way?

The right to buy and sell is a vested right; it is a property right of the highest importance. Destroy the right to sell, and the value of property goes to nothing. What was done by the corporations in this case, under the facts, certainly—and without the facts, so far as any evidence appears—was the exercise by this corporation of the right which it possessed to buy property; and what was done by the vendor was the exercise of the right which the vendor possessed to sell property.

Grant that Congress had the power to interfere with this most essential right of property, the right of buying and selling: Are you going to make this interference by judicial decision? Will you destroy this property right by interpretation, when Congress itself has not expressed, not merely not in clear but not in the most indistinct language, any intention to interfere with the doing of anything of that kind?

If they mean it, they will pass a statute. There seems to be no difficulty in passing statutes leveled at what are popular targets. But until the Congress takes the responsibility of interfering with the right to buy and to sell where the right is exercised for the purpose of enlargement of business, let no judicial legislation upon such subjects be enacted.

But if it be the fact that this statute condemns the acquisition of the property of a competitor, where are you going to find the right to insert the word "material"? If there be a wrong in the acquisition of property, it is a wrong whether the ac-

quisition be large or small. There is no measuring stick put into this Act for the purpose of measuring how great the acquisition must be. The government, when it says it must be "material," does not tell us whether it shall be a third, or a fourth, or a half, or what. If the acquisition by a corporation competing with another of the competitor's property is a combination in restraint of trade, it is such combination, whether the acquisition be big or little. And Judge Lacombe has brought almost to the position of an absurdity the interpretation which would bring about such results by simply enforcing the interpretation according to its necessary and natural effect. He says:

"This statute condemns any contracts in restraint of competition; and therefore, wherever a competitor acquires his property, thereafter the owner is not going to compete, and you have restrained competition." And I submit that it is only because of the frightful consequences that would ensue from endeavoring to procure from this Court an affirmance of a principle which I am told was contended for by the Government in the Court below—it is only when, in cold blood, they see staring them in the face, in black print, the statement of a principle which would make illegal every acquisition of property by one competitor of another—that they shelter themselves by re-enacting the law, and putting in the words "material" and "having a tendency to confer power."

The next proposition I state is that in the present case the fact is that the acquisition of property was not for the purpose of destroying or restraining trade, but to increase that of the acquisitors. This purpose was accomplished, and the trade generally was enlarged and increased.

This petition is reeking with accusations of fraudulent motive and fraudulent conduct. It discloses the fact that in the mind of the very learned

and very able gentleman who drafted that petition, he did not think that standing upon the law alone he could succeed, and that he had to put around the law this bitter coating of coercion and fraudulent and undue and illegal acts. We took him at his word. The Government in this case had that extraordinary privilege which no suitor under the sun but the Government possesses, or a State sovereignty—the opportunity to go through every book, paper and letter that had accumulated during the years of the operation of this company for the purpose of examining and seeing whether it could find among its private papers something with which to condemn it. We would have thought that in a petition of this sort, making these grave and most damning unproven accusations, the Government would have sought to strengthen itself by the proof of some parties, some human beings who upon their oaths would swear to the things which they accused this company of perpetrating. Why, if this company had done the things that are charged in this petition, if its course had been one course of destruction of the interests of others, if it had ruined the properties of others and then coerced them into selling, if it had driven them out of trade and made their trade impossible, what a cloud of witnesses could have been summoned by the Government to prove that fact!

Tell me that if it had done these things innumerable, there would not have been one witness, at least, produced who would have sworn to the fact! The very fact of that failure, the very fact of the inability to produce the witnesses who must have existed in swarms if the fact existed, is the best thing that can be said in favor of this Company, and shows why it was that in the Court below, disposed as that Court was (properly disposed, of course) to rule against this Company, it found no strengthening in the facts. It always must be a

satisfaction, when any great result is reached in the way of condemnation, if, to the condemnation upon technical points of law, the learned Judge who delivers the opinion can add the moral and the legal condemnation of facts.

There was no such thing. But, delving among the letters of the corporation (a corporation engaged in active business), and finding among the letters of those who were the salesmen of the corporation (some of them occupying the positions of vice-presidents of the corporation)—finding in that hustle of business certain things, they come here, unable to produce a human being who will show any harm that was done, and say: "By those letters we have established certain facts."

I should like to see the corporation guilty of violating the laws governing interstate commerce, or innocent as a babe in the matter, whose private salesmen's letters could be exhumed through a period of years, and you would not find something. But do not say, when you find two or three letters that you can read with gloss and make them bad, that you produce some "typical" letters. Say what is the fact—that having made these charges, and having failed to establish them by a single human being, you rely upon the letters. With your ability, and with your knowledge of the case, you may be sure that you would regard it as your duty to your client (and would so discharge it) to produce every letter that sustained your charges. And in this case the mountain has labored and has produced a mouse!

Oh, but we have this theory of possession of power! You acquire a large ownership, and you have the power! Power to do what? Does not anybody who is familiar with the operations of business know that the great trouble with a corporation which produces a large percentage of the business is that it has got to carry in its business

the corporation which produces a little? It cannot afford, by reason of the great destruction that will ensue to it by reason of its large product, to reduce its price for the purpose of reducing the price of its adversary. They say: "Why, you cut prices on certain occasions." Of course we did. The man in the business world who, when he is smitten on one cheek, meekly turns and requests his adversary to please smite him on the other, is an almost unknown quantity. And you may be very sure that if their business was attempted to be taken away from them by cutting prices, they would respond with a cut. But can one side cut and be good, and the other side cut and be criminal?

This idea of cutting and reducing prices is one of the ridiculous features of modern argument. Why, we are taught that competition is the life of trade. Nothing may be done that will interfere with competition. What is competition? It is a war between two producers of the same commodity. It is a war to the death, if it can be. They cannot agree that they will not compete in the most bitter way. Are you going to penalize them if they are carrying out what you say they must do, competing without restriction, because in the competition one is ruined? All business life is a survival of the fittest. That is the very beginning and end and object and purpose of this competition which this Court has said so much to favor. And now they come and say: "You must compete"; and then they say: "You are guilty sinners because you compete by endeavoring to prevent the other person from walking away with your business."

It is said that in this case the others cannot compete. No human being has been produced to say that he could not. There is that most extraordinary fact—that during the course of the operations of this company, of latter times there is a

constantly decreasing percentage of the business done by it. How on earth are you going to maintain, before a court of men of the world as well as men of the law, the proposition that you cannot compete, that we have got the possession of the power which destroys the competition of others, when the fact is that the independent operators are producing increasingly each year a larger amount of product?

That is, perhaps, largely owing to the peculiarity of this business. You have been told by both sides that it is a business of brands. A man who indulges in the pleasure of chewing tobacco has a brand which he will chew, and you cannot tempt him to chew another. You might put his price up a few cents on each ball of tobacco, and you might put it down, and an angel from heaven could not persuade him to chew the cheaper product and eschew the more expensive one. And that may be the reason for this. But be the reason what it may, the independent operators, despite this assertion that they cannot compete, are growing in volume and importance, and some of them are growing excessively rich.

What was the reason of this acquisition? You have the testimony of Mr. Duke. Mr. Duke testifies on that subject, without cross-examination breaking him. There is none. Our learned opponent was wise in that. Some men you cross-examine, and some men you do not. The man whom you know to be telling the truth, and the man who is not able to be beaten out of his statements of the truth by cross-examination, is let go if the cross-examining counsel is as intelligent as my learned opponent. But he tells you, taking up one by one the history of these acquisitions (and there is no countervailing proof), that of course they wanted to increase their business; of course they wanted to make their business as great as it could

be. Is that a crime? Let it be once known that the man who succeeds by reason of his success becomes a criminal, and you have written the death-warrant of the success of American industry.

Of course they wanted to succeed. They had more brands, and they grew. They had more money. We have not yet reached that degree of socialism in which the possession of wealth is to be condemned as a crime. There are many punishments that can be inflicted upon a man who gets wealth illegally; but the mere acquisition of wealth gives him the advantage that goes with wealth.

The purchase of these things broadened the business. When they feared one business was declining, they took another; they added to it. If they could not make their living making smoking tobacco, they would acquire some plug tobacco manufactories. They are not in any way in competition. A man may have ever so many industries. The fact that he is broadening them out does not do it. Does he broaden them out for any illicit or unlawful purpose, or for a real one? That is the test. You have been told here: "Why, everything was acquired." If a few factories were not operated, it was because they could make the brand which they had acquired by virtue of the purchase more economically at another place. They greatly diminished their expenses; and they were able, by reason of that, of course, to have a certain amount of power. American products, which are now shipped in enormous quantities to foreign countries, would have not one iota of a chance of acceptance there if it were not for the economies that have been worked by the holders and operators upon a large scale. The very purpose and tendency of modern business, the very necessity of modern business, is to enable the manufacturing to be done most economically; and it can only be so done by manufacturing upon such a large scale

that to-day the profits coming to those who operate are solely the result of their economies.

They made the test of this thing. It is said, "You bought this thing for a purpose." If the thing that we did was not of itself illegal, then there was no intendment against us. The wrong motive must be proven. It will not do for me, if I enter into a contract not to compete, to say that my motive was laudable. I have violated the law by entering into a contract in restraint of trade. But if I am doing a thing which may be good or may be bad according to my motive, then it is for the Government which attacks my motive to prove it. In this case there is no proof to sustain the attack; and all the proof is upon the side of this corporation.

The next proposition is that there is no duty on the part of a trading or manufacturing corporation to compete. The prohibition is against their agreeing not to compete. If, therefore, non-competition is the result of acquisition, the Act is not violated.

It does not lie in the power of Congress to compel a manufacturing or trading corporation to compete. It lies within its power to prevent it from competing. It may search with a microscope for the motives of the thing; and when it establishes the motives, it may ask for the condemnation. But if the non-competition is the result of an indisposition to compete, the whole thing is powerless. And it is that which is the basis of one of the leading points of argument in this case—that there is no duty on the part of trading corporations to compete. They may manufacture or not, they may compete or not, as long as the non-competition is not the result of an agreement.

What is the deduction from that proposition? If they are not obliged to compete, there can be no illegality in the sale by one competitor to an-

other, because the resultant is that the purchasing competitor will no longer have it to his interest to compete. You cannot add three nothings together and make the addition anything more than nothing. You cannot add three manufacturers together, neither of whom is under any duty to compete, and, because of a *bona fide* acquisition by one of the property of the three, because thereafter he does not or will not or has not the interest to compete, say that the acquisition itself was criminal. He is doing nothing which destroys a right.

The vendor sells because the equivalent which he receives in cash or shares is more important to him than the thing he sells. The vendee buys because the thing he gets is more important than the thing that he parts with. And therefore the purchase by a competitor under those circumstances cannot by earthly possibility be enlarged into the idea of a contract or combination in restraint of trade. He is exercising an inherent property right for a legitimate and proper purpose.

Regarding this idea of the possession of power: We are not dealing with public service corporations. What does it boot? A, B, C and D are not obliged to do a certain thing. A, B, C and D sell their property to X; and X does not find it to his interest to compete with himself. He possesses the power not to compete. Why, of course, he does. He but acquires by that transfer of property, the right which existed in the transferror. And this act, in some of the decisions (not the decisions of this honorable Court), is read as if it was an act to prevent the stifling of competition. There is no word "competition" anywhere in the Act. You have said that to agree not to compete is a restraint of trade; but you have not said that it is the duty of people to compete. You

have not said that if, in the ordinary course of business, something happens by which (if you choose to use an opprobrious name, "stifling") you have a stifling of competition, if that stifling of competition is the result of a property right, you have violated any statute.

That brings me to the consideration of the differences between private corporations and public service corporations. There are three. It is not for counsel to question any decision of this honorable Court. That would be about the worst tactics and the poorest thing he could do. The duty of counsel is to accept loyally—whether he does or not matters not, but it is his duty to accept loyally—every decision of this Court, and not to rise and challenge it. And my purpose now is to show the vast difference between the Northern Securities case and this case.

The first difference is this: In the Northern Securities case you were dealing with public corporations, charged with a duty to the public. The Great Northern and the Northern Pacific Railway Companies had availed themselves of a grant of a franchise. That franchise had enabled them to exercise the right of eminent domain. It could only have been granted because they undertook a public duty. Therefore, whenever anything was done by two corporations, each charged with a public duty to compete, which interfered with their competition, they brought themselves within the range of an act which interfered with or restrained trade or competition. On the one hand is a private corporation, with no duty to compete. On the other hand is a public corporation with a duty to compete. One violates its duty by giving the control of two properties in any way to one; and the other does not violate any such duty.

The next difference is that the Northern Securi-

ties Company was a holding company pure and simple. There was no trade or transportation purpose to be accomplished by the Northern Securities Company. It had no railroads; it did not operate any railroads. It was organized merely for the purpose of acquiring the shares of stock of corporations. You held that that belonged to a class of holding corporations. It was, in the language of the learned Justice who delivered your opinion, a custodian of those shares. This Court found that it was assimilated in some respects to the old trust, where the trustee acquired the title to shares of the stock of various corporations, and in that way controlled the whole. And in that case, finding that that corporation was going to discharge no duty which made it necessary for it to acquire the shares or property, that it had no transportation duties, and, under the statement of some of the witnesses, that they were desirous of having all the shares under one ownership, you held that that was an assimilation (because of the lack of a *bona fide* purpose of acquisition) to the old trust. And in that case there was this peculiarity: By the Minnesota law the corporations were forbidden in any way, shape or form to consolidate or to destroy competition. Therefore their intra-state business was not necessary to be protected by any decree of this Court. All that this Court need deal with was the interstate commerce. In dealing with the interstate commerce, it could not interfere with the intrastate commerce, because the intrastate commerce was protected by a similar Minnesota law. And therefore you held, among other things, in that case, that where the interstate business was the only one that could be affected, the other not being affected by this thing, you could do what cannot be done with a manufacturing corporation which, even though you do not apply the doctrine of the Knight

case, was a corporation which, at any rate, had property in the State, and did do an intra-state business which is affected by anything that you do.

The attempt to monopolize which is condemned is not the mere acquisition or ownership of a large portion of the property. If a large portion, how large? The word is not "monopoly"; the word is "monopolizing or attempting to monopolize." And in doing that you are dealing with something that is not satisfied by merely saying: "By the acquisition of a large part of the property you are doing that which violates the Act." And you must bear in mind that in applying the law in this case you must deal with an individual precisely as you would deal with a corporation. The learned Assistant Attorney-General says: "We do not pretend to interfere with the act of an individual in such matters"—at least, I so understood him—"but we say that a corporation cannot do this thing." But there is no differentiating. It is "any person who shall monopolize or attempt to monopolize," and the lexicography of the Act is that "person" means "person or corporation." Therefore whatever the corporation cannot do, the individual cannot do. And therefore, if their interpretation is to apply, neither individual nor corporation can acquire and hold a large part of any article, manufactured or otherwise, or any appliance for manufacturing.

In interpreting that Act you have enormous help from the words "any part." The Act says, "Any person who shall monopolize or attempt to monopolize the whole or any part of the trade," etc. You have got to find some meaning for that that does not bring you to this: That any person who gets the whole or the larger part of any part of the trade is guilty of a monopoly, or of monopolizing within the meaning of that Act. I may be dealing with the smallest part of the trade. If I buy from my com-

petitor the smallest part of the trade, or if I acquire from a person who is not a competitor the smallest part of the trade, I have acquired "any part"; I have acquired some part. And therefore, in order to give all the words of the statute a meaning, we have got to put a meaning upon the statute which takes into consideration the existence of the words "any part"; and they cannot mean the acquisition or the holding or the ownership of a larger part of any part, or the whole of any part.

We are helped by the old definition. I do not intend to put it to your Honors. It has been put to all of you tens of times. But the idea of a monopoly originally included an exclusion. It was not merely the thing, but the exclusion of the thing. And in all that has since been done, that idea of exclusion runs through the whole thing. And therefore we must consider, in connection with the words "to monopolize or to attempt to monopolize," the words "any part"; and in order to consider that we must consider an idea of exclusion. And my definition of "monopolizing or attempting to monopolize" is the acquiring of the property, and excluding, not by legal means—because by my acquiring I necessarily exclude—the acquiring accompanied by excluding others from their rights by illegal acts.

The part of the Act which prescribes that offense is peculiarly put. In the first place, it does not seem to be a vital part of the Act, because it is not made applicable to the Territories. That clause is omitted in that connection. They do not penalize it by allowing you to seize the property in course of transportation. It was a round-up of the Act. The first section dealt with two or more; it was a contract, combination or conspiracy, which required more than one. The next part of the Act deals with one—"any person who shall monopolize or attempt to monopolize"; and it

makes this an offense. What? If he acquires it in the ordinary exercise of a right of purchase which has not in any part of the Act been attacked, that is well enough. But if he acquires it by illegally excluding others, then he has violated the Act. Now, how may he illegally exclude others?

He may do it by corralling the means of transportation. He may do it by coaxing away employes. He may do it by a hundred different ways, illegal ways. And if, therefore, he monopolizes —that is, he acquires by excluding illegally—he may do this thing. It cannot mean anything that has not a great limitation upon it; because otherwise the competitor who is beaten in the fight for trade cannot sell out his property; a man who has become too old to carry it on cannot do it; the heirs of a man who dies cannot do it. You cannot prevent the acquisition of the business of a man who does not care any longer to go into trade, because in doing that you do more harm than you do good. But you can prevent the acquisition by illegal means, by excluding others, by some act that you have no right to perpetrate, from the enjoyment of their rights.

A man may start a new industry. He is the only man who understands the industry; and he builds up a large trade. There is no other. One does it in the country. He has a monopoly. You do not mean to say that that man is intended to be punished as a criminal because he has the whole of the trade. For some reason or other, competitors may find their business failing them, and they may go out of business; or the manufactories of rivals may be destroyed, not by the competitor himself, and there will be left in business only the carrying on of that thing. You cannot monopolize manufacturing in any other sense. As

fast as one manufactory is carried into the corporation which acquires it, if it is a profitable business, you will find, with the immense amount of capital seeking investment in this country, plenty of other people ready to follow and put more manufactories in. But if you acquire and in some way exclude others, then you do what the exclusive grant in old times worked.

The remedy decreed is one which defeats the object sought to be accomplished by the Act. The failure to prescribe a remedy which does not involve such defeating demonstrates the lack of intent to prohibit anything which can only thus be remedied.

The purpose of this Act is to prevent a restraint of trade. Manufacturing corporations have acquired manufactories and shares of stock of other corporations, and they manufacture. Up to that point nobody can interfere with them. But this decree says: "You shall not put that manufactured product into interstate commerce." Suppose it was within the power of Congress to say that anybody who, in the States, had indulged in the evil act of acquiring what they thought were too many manufactories, could not get any advantage of that act done under the State law by putting the product into interstate commerce. Suppose it was in the power of Congress to draw a hard and fast line barring the putting into interstate commerce of the product of manufactories under State law. Would you not require them to say that, before anything so drastic and so revolutionary would be attempted? Would you not require the legislature to say, in the plainest possible words, that thing? But it has not said it, nor has it said anything of the kind. It has given no remedy of that sort. But the Court says: "You, who may have manufactured under the

State law, and manufactured as much as you pleased, you have got manufactories: You shall not put that product into interstate commerce, and we forbid you to do it." Does not that emphasize the dividing line? Does not that show the product, until it reaches a certain point (to wit, the putting it into the stream of commerce) is under the State law? If you are putting out that product, the legislature not having said that you shall be debarred from interstate commerce by reason of having so manufactured it, to what extent can you be interfered with? To any other extent than to such an extent as will prevent you from deriving any value from your property by putting it into interstate commerce? Does not that work the direct antipodes of the purpose of the Act? There being no other remedy which the learned Court thought possible, can it be that this Act was leveled at the thing which has been condemned in this case, when the only thing you can do under a law which has been passed to prevent restraint of trade is to prevent it altogether to the extent of nearly three-fourths of the tobacco product of the country outside of cigars? You can gather the meaning of a legislature, sometimes, by the failure to give the remedy for such a thing as you interpret to be covered by the Act.

This corporation might simply stop; it might manufacture, and not put a pound of its manufacture into interstate commerce. Wherein could you interfere with it then? Or it might manufacture, and it might sell *bona fide* and deliver in the States to a third person its product. You could not interfere with it then. I am giving you those illustrations to show that by reason of failing to provide a remedy, the legislature did not have in contemplation the thing which is condemned.

Now, with regard to monopolization: What is your remedy there? They have said, "appoint a receiver." How are you going to appoint a receiver for the manufacturing companies in the various States? "Appoint a receiver," they say, "for the purpose of distributing your properties." How are you going to distribute the properties by reason of that receiver? Another suggestion is, "Appoint a receiver for the purpose of running these properties." Why, even in cases of specific performance the courts have declined the jurisdiction because of the impossibility of carrying it out. Are the courts going to appoint receivers for the purpose of running all the corporations which the government may find amenable to this law? Is it possible that there shall be any such remedy as that? And because there is no such remedy, do we not draw some inferences as to what is the meaning of the Act? The suggestion is made: "Prevent them from receiving dividends." That might do in the case of a public service corporation; but by what right do you prevent this corporation from receiving dividends accruing from the manufacturing of these manufacturing plants?

We have shown the remedy for punishing any monopolizing which consists in the doing of an illegal act. It is very plain; the punishment is pretty severe; it is not very likely, with the awakened attention that has been given to these things, that that will be done. If any corporation, by reason of its possession of the power, is found to abuse it in an illegal way, that is directly amenable to the Act.

In these days in America, as in India in the past times, there are men who are denounced as the Warren Hastings of trade. It may be; the pathway of great achievement is not always strewn with roses. But if you destroy the work that these men

have done, who will foretell the result? They have planted our commercial flag in every part of the world, upon inaccessible and most remote heights as well as in valleys. You are not going to benefit the laboring classes by doing that which will deprive them of the employment that they have been given, and that they would get in no other way. The struggle for the trade of the world is between nations. And who will say, with any assurance, that you can safely substitute for the herculean work of the financial giants the puny efforts of the pygmies that will be left in trade?

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Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 118.

UNITED STATES OF AMERICA,
Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Appellees.

Brief on Reargument for the Imperial Tobacco Company of Great Britain and Ireland, Limited, Appellee (Impleaded with The American Tobacco Company and others).

WILLIAM B. HORNBLOWER,
JOHN PICKRELL,
WILLIAM W. MILLER,
MORGAN M. MANN,
Of Counsel for the Imperial Company, Appellee.

C. G. Burgoyne, 72 to 78 Spring Street, New York.

In the Supreme Court of the United States,

OCTOBER TERM, 1910. NO. 118.

THE UNITED STATES OF AMERICA,
Appellant,

AGAINST

THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, LIMITED, (Impleaded with THE AMERICAN TOBACCO COMPANY and others),
Appellee.

BRIEF ON REARGUMENT FOR THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, LIMITED, APPELLEE.

This is an appeal by the United States from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing the petition or bill of the United States in this suit, as against the defendant The Imperial Tobacco Company of Great Britain and Ireland, Limited.

That Company is a corporation created under the laws of Great Britain, as is also the British-American Tobacco Company, as to whom also the bill was dismissed.

The ground on which the bill was dismissed as to these two Companies was that they are British corporations and that the contracts entered into by them with the American Tobacco Company were entered into by them in London, Eng-

land, where such contracts were legal and proper, and that they have not been carrying on business in this country in violation of the Sherman Act.

See opinion of Judge LACOMBE, page 294 of the record,

where he says:

> The Imperial Tobacco Company of Great Britain and Ireland (Limited) is one of the defendants. It is a British corporation and entered into a contract with the American Tobacco Company in the city of London, where such contract was a legal and proper one. It is apparently the contention of petitioner that subsequent acts of the Imperial Tobacco Company in this country practically amount to the entering into a combination or contract of the sort specified in the statute. So far as appears the only transactions of that company here are these: It buys leaf tobacco of the American grower in very large quantities by its own independent force of purchasing employees; it does not sell its manufactured products here—indeed, such products, having to pay both tariff duties and revenue tax, could not be sold here except at a loss, save in the case of a few fancy high-priced brands. It may be an enlightened public policy to prohibit an alien corporation from buying its raw material in this country unless it sends its products here to compete with American manufacturers; but if it be, this act seems not to have gone to that extent. The petition should be dismissed as to the Imperial Tobacco Company. A like disposition should be made as to the British-American Company."

See also opinion of Judge COXE, at page 295 of the record,

where he says:

> "As we are unanimous in thinking that the testimony shows no case for a receiver and that the bill should be dismissed as to the defendants The Imperial Tobacco Company and the British-American Company, nothing need be added to what Judge LACOMBE has written in arriving at these conclusions."

The opinions of the Court below are reported 164 Fed. Rep., 700. See as to Imperial Company, pages 703, 704.

It is not claimed by the Government that the Imperial Company or the British-American Company is in anywise responsible for anything that took place prior to 1902, at which time the Imperial Company entered into contract relations with the American Company, and at which time the British-American Company was formed.

By far the greater part of the testimony taken in this cause has to do with the alleged combinations entered into by The American Tobacco Company and its allied Companies in this country, with which the Imperial Company and the British-American Company have no concern. It is claimed, however, by the Government that the contracts entered into by the Imperial Company in 1902 were in themselves a violation of the Sherman Act, and that the transactions of the Imperial Company since that date have been in violation of the Act. To these questions we shall address ourselves.

Statement of Facts.

The Imperial Company is a British corporation, organized under English law in October, 1901. It was organized with a capital stock of fifteen million pounds sterling, afterwards increased to eighteen million pounds sterling. As originally organized it had no relations whatever with The American Tobacco Company or any other of the defendants, nor did any of the defendants own a share of its stock. It was organized for the purpose of bringing into co-operation a number of leading tobacco manufacturers of Great Britain. It is charged in the Bill of Complaint or Petition that the result of its organization was to create a monopoly of the business of manufacturing tobacco in Great Britain. This charge is denied by the answer of The Imperial Company. No proof was adduced by the Government in support of the charge, and the testimony established the contrary. It is *not claimed*, however, in the Bill of Complaint or Petition that the purpose of organizing The Imperial Company was to create a monopoly of the business of manufacturing tobacco *in the United States* or to restrain trade or com-

merce *between the various States* of this country or *between this country and Great Britain.*

In September, 1901, The American Tobacco Company, finding it impracticable to successfully compete in Great Britain with British manufacturers, by reason of discriminating differentials against imported tobacco products manufactured abroad, had purchased control of a Liverpool Corporation organized under the laws of Great Britain and doing business in Great Britain, known as "Ogden's Limited", which was engaged in the business of manufacturing, selling and dealing in tobacco products. A "fierce trade conflict" arose between Ogden's Limited and the other English manufacturers. After the organization of the Imperial Company in October, 1901, that Company became involved in this trade conflict.

The foregoing facts are conceded by the Government's bill or are established by undisputed evidence.

With a view to putting an end to the ruinous competition which was being carried on between the Ogden's Limited and The Imperial Company, negotiations were entered into *in England* in the Summer of 1902, between certain of the officers of The American Company, acting on behalf of the Ogden's Limited, who went to England for that purpose, on the one side, and The Imperial Company on the other, looking toward the sale of the business of the Ogden's Limited to the Imperial Company. This sale was effected and the terms of sale were embodied in the Agreement annexed to the Bill of Complaint, Exhibit 1, dated September 27, 1902. Contemporaneously with this Agreement negotiations were entered into between The American Company on the one hand and the Imperial Company on the other, looking toward the transfer by each Company of its business of exporting to foreign countries, other than the United States and Great Britain. These negotiations resulted in the formation of the British-American Company under certain terms and conditions which are set forth in Exhibit 2, annexed to the Bill of Complaint.

The Government claims that these two Agreements are illegal under the provisions of the Sherman Anti-Trust Law. We deny that there is any illegality. We assert that these Agreements were not intended to operate, and did not in fact operate, to restrain trade or commerce between the various

States or between the United States and foreign countries, and that they are in no respect obnoxious to the provisions of that Act, or of any law of the United States, and that the Bill was properly dismissed so far as concerns The Imperial Tobacco Company, Limited.

The Imperial Tobacco Company has no organic connection with the American Company or any of the other defendants (except the British-American Company) named in the Bill of Complaint.

The Imperial Tobacco Company never has owned and does not now own a single share of stock of the American Tobacco Company, or of any of the other defendants in this action, except the British-American Company. Aside from two of the three directors who nominally represent the American Company on the Imperial Board, no officer or director of the Imperial Company owns any stock in the American Company. The Imperial Company has no agreement, contract or arrangement of any sort with the American Company, or any of the other defendants in this action, except as appears by the two written agreements annexed to the Bill of Complaint hereinbefore referred to. The Imperial Company has no representative on the Board of Directors of the American Company or of any other of the defendants, except the British-American Company, and has no control in any way over their business affairs, or any knowledge of their business affairs other than such knowledge as is open to the public generally (See Record, Vol. II., pp. 56, 57).

Counsel for the Government state in their brief that the American Company "is a *large stockholder*" of the Imperial Company "and selects three Directors." It is true that the American Company holds a considerable amount of stock of the Imperial Company. It holds, however, but a *small minority* proportion of the stock. The amount of stock held by the American Company has *never exceeded 18 per cent. of the total* capital stock of the Imperial Company.

The *American Company has never owned and does not now own any shares of stock of The Imperial Company, except such shares of stock as it received as part payment for Ogden's Limited.* These shares of stock were not acquired by the American Company with a view to obtaining the control of the Im-

perial Company. So much is this the fact, that the American Company's holdings of stock in The Imperial Company have *decreased by sales of the stock* which it received from The Imperial Company. Its interest in the affairs of The Imperial Company is today less than it was at the date of the sale of Ogden's Limited. Of the shares of stock received on the sale of Ogden's Limited, the American Company has left today only £750,000 of the deferred ordinary shares of Imperial Stock, being *less than 5 per cent. of the capital stock* of that Company (pp. 56, 57, Vol. II. of Record).

As a matter of fact The American Company does not in any way control or direct the affairs of The Imperial Company.

It had, by the agreement, Exhibit 1, the right to select three directors out of the twenty-eight, to represent the interests sold by the Ogden Company, but of this number *only one director has ever attended the meetings* of the Board of the Imperial Company, so that the American Company has had *no control whatever over the affairs of that Company* (Record, Vol. II., p. 57).

Except as shown by the written agreements and except for the contractual relations created thereby The Imperial Company is absolutely distinct and separate from The American Company and from each of the other defendants (Record, p. 58, Vol. II.).

At the time of making the written agreements of September 27, 1902, *The Imperial Company was not engaged in the business of manufacturing in the United States, nor was it shipping to the United States its manufactured products* to any considerable amount (the total export from Great Britain to the United States of all kinds of manufactured tobacco products being less than 150,000 pounds per annum, an inappreciable quantity as compared with the total amount used in this country), *nor was The American Company or any of the other defendants shipping to England manufactured tobacco products* to any considerable amount. The Protective Tariff in this country and the system of differential duties in England, to which we shall hereafter more particularly call attention, effectually prevented any profitable business being carried on as between the two countries in manufactured tobacco products (Record, Vol. II., pp. 58, 59).

The effect of the working of the differential in England and the protective tariff in this country as preventing the importation to any appreciable extent of manufactured tobacco from one country to the other, is very clearly explained by Mr. James B. Duke, President of the American Tobacco Company, in his testimony (Rec., Vol. IV., pp. 451, 452).

The total annual importation of manufactured tobacco from Great Britain to the United States prior to 1902, which, as we have said, amounted to less than 150,000 pounds, consisted of cigarettes and smoking tobacco (there being no cigars, plug tobacco or snuff manufactured in Great Britain which was exported to this country (Vol. II., pp. 723, 724; Vol. III., pp. 217, 234). The total product of cigarettes in this country in that year was 2,971,630,447 cigarettes, and of smoking tobacco 131,130,733 pounds (Appendices "F" and "H" of Government's Brief). The figures given for cigarettes are not pounds, but the number of individual cigarettes. Cigarettes run three pounds to the 1,000 (Vol. II., p. 54; Vol. IV., p. 698), so that to ascertain the amount in pounds it is necessary to multiply by 3 and divide by 1,000. As thus figured, the total cigarette output of the United States in the year 1902 is found to be 8,914,081 pounds; so that the total number of pounds of both cigarettes and smoking tobacco produced in the United States in that year was 140,044,841. It appears, therefore, that the amount of tobacco then being exported from Great Britain to the United States was *little more than one one-thousandth part of the American product*, with which it could have come into competition, a negligible quantity.

As to exports from this country to Great Britain prior to September, 1902. There was no exportation of snuff (Record, Vol. III., p. 217, p. 235) and practically none of plug tobacco (Record, Vol. II., p. 724), and after the purchase of the Ogden's Limited by the American Company in 1901, there was none of cigarettes or smoking tobacco (Vol. IV., p. 451). It has never been claimed by the Government that there was ever any exportation to Great Britain of cigars manufactured in the United States.

There was, therefore, *no competition* between The Imperial Company on the one hand and The American Company or any other defendant on the other hand, except so far as concerned the business carried on by the Ogden's Limited, *in England*, in the interest of the American Company. It was to put an end to the ruinous *competition in England* between Ogden's Limited and the Imperial Tobacco Company that the agreements of September 27th were entered into *in England*.

It is averred in the Government's bill that "during 1902 the Imperial Tobacco Company resolved to undertake the manufacture of tobacco products within the United States and began the necessary preliminaries therefor," and the suggestion is thrown out that one of the motives inducing the American Company to enter into the agreements with the Imperial Company was to prevent anticipated competition in this country between the American Company and the Imperial Company in the business of manufacturing and selling tobacco products in this country.

There is no evidence in the record of any such intention on the part of the Imperial Company, or of any steps taken by that Company with a view thereto. The only pretense of such testimony is found in Volume II. of the Record at pages 210 and 211, and on pages 241 to 246, and is in substance as follows: Mr. Percival S. Hill, one of the Vice-Presidents of the American Tobacco Company, having been called as a witness for the Government, was asked by Mr. McReynolds at page 210 whether or not he was advised of the fact that the Imperial Company was considering the advisability of establishing factories in the United States.

He replied that he had never heard of such a thing, and he was then asked whether or not he testified about the matter before the Grand Jury and whether or not he knew, prior to September, 1902, *through rumor or otherwise*, that the Imperial was considering this step. His answer was that he did not believe that he knew it, that he did not know that he ever knew it, that he certainly knew nothing about the date, and that he had no recollection whatever of being advised just prior to the agreement (Ex. 1) of this purpose of the Imperial Company. He was again questioned as to this (pp. 241 *et seq.*) and again stated that he had no recollection whatever of the matter.

Certain testimony alleged to have been given by Mr. Hill before the Grand Jury was read to Mr. Hill, but he denied remembering anything about it. The testimony itself was not put in evidence from the stenographer's minutes. It would not have been competent as against the Imperial Company if offered. The only effect of it would have been to discredit the testimony of Mr. Hill, who was the Government's own witness. He was not an officer of the Imperial Company, but of the American Company. The Imperial Company was not a party to the proceedings before the Grand Jury in any shape or form.

Furthermore, even if there had been rumors with regard to the intention of the Imperial Company to start manufactories in this country, that circumstance would have been of no significance. *The question would remain, were the rumors true?* There was no attempt whatever by the Government to prove this fact.

Furthermore, Mr. Hill as an officer of the American Tobacco Company, had no part in the negotiations which took place in England with the American Company, which resulted in the two agreements, Exhibits 1 and 2, and knew nothing about those agreements until after they had been executed, and therefore, his state of mind at the time of the execution of the agreements was of no sort of consequence (Record, Vol. II., pp. 286, 287).

The testimony shows that certain representatives of the American Company went to England for the purpose of negotiating with the Imperial Company with regard to selling to the Imperial Company the interest of the American Company in the Ogden's Limited. These representatives were Mr. James B. Duke, Mr. W. W. Fuller, Mr. Thomas F. Ryan and Mr. Harris. These gentlemen were examined as witnesses and they testified on this subject as follows:

The testimony of Mr. Duke (Record, Vol. IV., p. 454) was:

> "Q. It is alleged in the bill of complaint or petition that just prior to these agreements the Imperial Tobacco Company had intended to establish factories for the manufacture of tobacco in the United States and were prevented by the execution of these agreements. Had you heard anything of that?
>
> "A. I had not."

That of Mr. Fuller (Vol. IV., p. 716):

"Q. Had you heard of any prospective building or acquisition of manufacturing plants in America by the Imperial?

"A. I had not, sir."

That of Mr. Ryan (Vol. IV., p. 726):

"Q. Were you actuated in the making of this agreement by any threats on the part of the Imperial Co. that they were going into business in the United States?

"A. None whatever.

"Q. That they were going to establish factories for their business in the United States; had you heard any such statements or rumors thereof?

"A. No.

"Q. None whatever?

"A. None whatever."

And at page 727:

"Q. You have testified that you had not heard of any intention on the part of the Imperial Tobacco Co. to engage in the business of manufacturing tobacco products in America?

"A. Yes.

"Q. So that question did not enter into or become a part of the subject of the negotiations in England, nor was it a consideration?

"A. Oh, no; there was nothing of that kind that I heard of."

And that of Mr. Harris (Vol. IV., p. 741):

"Q. Mr. Harris, had you heard any rumors about the Imperial Company expecting to begin manufacturing in this country at the time you went to Europe in the summer or fall of 1902?

"A. No, sir.

"Q. And you had no discussion on that subject with any of your brother officials?

"A. None whatever."

There is no evidence in opposition to this testimony and no attempt to show that there was any intention on the part of the Imperial Company of undertaking manufacturing in the United States.

Prior to September 27, 1902, neither the Imperial Company nor any of the companies, associations or copartnerships that formed the Imperial Company had ever manufactured tobacco in the United States (Record, Vol. IV., p. 454). This fact is not disputed by the Government.*

Coming now to the two agreements of September 27, 1902 (Exhibits 1 and 2), annexed to the Bill or Petition of the Government, which are attacked in this suit, as alleged to be in violation of the Sherman Act.

The material portions of Exhibit 1 are the following:

1. The Ogden Company agreed to *sell* and the Imperial Company agreed to *purchase* as from the 30th day of September, 1902, the undertaking of the Ogden Company, including all its *real and personal property* and "*good will*, formulæ and recipes for the preparation, treatment, and manufacture of tobacco, patent rights, trade-marks, brands, licenses and other exclusive rights and privileges," with certain exceptions, among which exceptions is the export business including the good will and trade-marks of such export business of the Ogden Company and the plants occupied, used or acquired for the purpose of such export business.

2. The Ogden Company was to receive as the consideration of the sale, the value of the real and personal property of the Company as appearing by its books and the value of the good will of the business taken at the sum of £1,500,000 including patent rights, trade-marks, brands, licenses and other exclusive rights and privileges and all the shares in the British Company (a subordinate Company).

3. The consideration for the sale was to be satisfied as follows:

(A) The amount payable for good will and other rights connected therewith, by the allotment to the Ogden Company or its nominees of fully paid-up shares in the Imperial Com-

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*The word "*factories*," appearing in the testimony as applied to the Imperial in this country, does *not* mean *manufactories of tobacco products*, but means rehandling plants for *treating tobacco*, that is, stemming and stripping leaf tobacco and otherwise treating it for exportation to Great Britain (See Testimony of Carlton, agent of the Imperial Company, Record, Vol. IV., pp. 230, 234, 273).

pany (consisting as to one-half of preferred ordinary shares and as to the other half of deferred ordinary shares) to be treated as of par value;

(B) One equal third part of the balance by the allotment to the Ogden Company or its nominees of fully paid-up preference shares in the Imperial Company to be treated as of par value;

(C) As to another equal third part of the balance by the allotment to the Ogden Company or its nominees of debenture stock of the Imperial Company to be treated as of par value;

(D) The residue by the payment thereof in cash to the Ogden Company.

There was a further provision as to payment which is not material here.

* * * * * * *

14. Each of the parties other than the Imperial Company agreed that it would not at any time after the transfer day, except as hereinafter expressly excepted,

> "directly or indirectly carry on or be employed, engaged, or concerned, or interested in the business *in the United Kingdom* of a tobacco manufacturer, or in any dealing in tobacco or its products therein, or sanction the use of its name in connection with any such business therein, save so far as the covenanting company, shall, as a member of the Imperial Company or as a member of any company manufacturing cigars in the United States or of any other companies formed or to be formed with the concurrence of the Imperial Company, be interested in the business thereof, or through or in connection with the Imperial Company, as hereinafter provided."
>
> "15. The Imperial Company similarly agrees and shall covenant with the American Company, the Continental Company, the Cigar Company and the Consolidated Company, that the Imperial Company will not at any time after the transfer day, except as hereinafter expressly excepted, either solely or jointly with any other person or persons, company or companies, directly or indirectly, carry on or be employed, engaged, concerned, or interested in the business in the United

States of a tobacco manufacturer or in any dealing in tobacco or its products therein, or sanction the use of its name in connection with any such business therein save so far as the Imperial Company shall, as a member of any other company formed or to be formed with the concurrence of the American Company, the Continental Company, the Cigar Company, or the Consolidated Company, be interested in the business thereof, and *save and except that the Imperial Company shall be at liberty to buy and treat tobacco leaf and other materials in the United States for the purpose of its business*, and save and except such business as shall be carried on through or in connection with the American Company, the Continental Company, the Cigar Company, or the Consolidated Company as hereinafter provided."

16. The Imperial Company agreed to appoint to its Board three directors nominated by the Ogden Company, who shall be re-elected at the next general meeting.

17. The export business of the Ogden Company was to be the subject of a contemporaneous agreement, providing for the transfer to a separate company of the export business from the United Kingdom, except to the United States, of the Ogden Company, the Imperial Company and the Salmon & Gluckstein, Limited, and the export business from the United States of the American Company, the Continental Company and the Cigar Company, except to the United Kingdom.

There were various other provisions of the agreement designed to carry it into effect, which it is not necessary to set forth, as no special point is made by the Government with regard thereto.

The only other clauses of the agreement which are important are the following:

"22. The American Company, the Continental Company, the Cigar Company and the Consolidated Company, together with their directors, entering into the covenant aforesaid, are to give to the Imperial Company in the United Kingdom the full benefit of their good will and support, and, on the other hand, the Imperial Company, together with its directors, entering into the covenant aforesaid, are to give the American Company,

the Continental Company and the Cigar Company in the United States the full benefit of their good will and support" * * *.

"23. *This agreement is to be construed and take effect as a contract made in England, and in accordance with the law of England,* but to the intent that any of the parties may sue in its own country."

Pursuant to the provisions of this agreement the Ogden Company conveyed and transferred to the Imperial Company its real property, plant, machinery, stock in trade and materials, trade-marks, brands, formulæ and good will, exclusive of its export business, and received from the Imperial Company cash and securities as provided in the agreemeet. The securities of the Imperial Company thus transferred to the Ogden Company for the benefit of the American Company as the substantial owner of the Ogden Company originally included preferred ordinary shares and deferred ordinary shares, preference shares and debenture stock. *The securities of the Imperial Company thus received amounted to about £2,650,000.* As heretofore stated *the American Company has disposed of all these securities* except £750,000 of deferred ordinary shares (Record, Vol. II, p. 56).

The contemporaneous agreement, Exhibit 2, relating to the formation of the British-American Company was an agreement between the Imperial Company of the first part; the Ogden Company of the second part; the American Company of the third part; the Continental Company of the fourth part; the American Cigar Company of the fifth part; the Consolidated Company of the sixth part and Williamson Whitehead Fuller and James Inskip on behalf of the proposed Company to be known as the British-American Tobacco Company, Limited, of the seventh part.

The agreement provides in substance that the parties of the first five parts shall *sell* and the British-American Company shall *purchase* the export business of the parties of the first five parts, and the good will appertaining thereto, including formulæ and recipes for the preparation, treatment and manufacture, as well as licenses to use patent rights, trademarks, brands, licenses and other exclusive rights and privileges for

the purposes of such export business, and also including shares of stock in certain companies.

The export business is defined in the agreement to mean "the manufacture of and dealing in tobacco and its products in any country or place *outside of the United Kingdom and the United States*, and the manufacture of and dealing in tobacco and its products within the United Kingdom for export to any other country except the United States, and the manufacture of and dealing in tobacco and its products in the United States (except in Cuba, Porto Rico, the Hawaiian Islands, and the Philippine Islands) for the purpose of export to any other country except the United Kingdom, and the manufacture and selling in the United Kingdom and United States, respectively, of tobacco to be supplied to ships in port for the purpose of ships' stores."

The price to be paid for the good will, including trademarks, brands, licenses and corporate shares in other companies was fixed at £2,820,000, of which two-thirds or £1,880,000 were payable to the Ogden Company, the American Company, the Continental Company, the Cigar Company and the Consolidated Company in such proportions as they should agree, and one-third or £940,000 were payable to the Imperial Company, said prices to be satisfied by the allotment to the parties entitled thereto of fully paid-up ordinary shares of the British-American Company to be treated as of par value.

The sale and purchase were to take effect as to the Ogden Company on the 30th day of September, 1902, and as to the remaining Companies on the 31st of October, 1902.

It was further provided that in addition to the ordinary shares agreed to be allotted in payment of the purchase money for the good will and intangible assets of the various Companies in connection with the export business the Imperial Company should take and pay cash for £300,000 additional of ordinary shares and the American Company and the other Companies should take and pay cash for £600,000 additional of ordinary shares in the British-American Company, Limited, which shares should be alloted to such parties at once.

It was further agreed that the Imperial Company and the Ogden Company would respectively *sell* to the British-American Company "their several lands, buildings and hereditaments used as export factories, and the plant and equipment

and stock in trade at the date of transfer forming a part of the said export business or undertakings, and the American Company, the Continental Company and the Cigar Company will *sell* to the British-American Company factories for export business, and the plant and equipment and stock in trade at the date of transfer forming a part of the said export businesses or undertakings."

It was further agreed that the factories of the Imperial Company to be transferred should include the export factory of the Imperial Company formerly belonging to W. D. & H. O. Wills, Limited, at Ashton Gate, Bristol, the leasehold export factory formerly belonging to Messrs. Lambert & Butler, Limited, in London, and the two export factories formerly belonging to the Richmond Cavendish Company, Limited, at Liverpool, and the cigarette factory of the Imperial Company, formerly belonging to W. D. & H. O. Wills, Limited, at Sydney, Australia. The export factories of the other parties were to include the bonded or export factory of the Ogden Company in Cornwallis street, Liverpool, and the factory at Sydney, and such other suitable factories as should be designated by the American Company, the Continental Company and the Cigar Company, " so that the price thereof, with their plant and equipment, as hereinafter fixed, shall not exceed the aggregate price of the factories, land and cottages, with their land and equipment, to be *sold* by the Imperial Company, as before stated."

It was further provided that " all the said factories and the plant and equipment used in connection with the same are to be taken at the value now standing in the books of the respective vendors in cash."

It was further agreed that as part of the export business and good will to be sold by the Imperial Company to the British-American Company, the export business of Salmon & Gluckstein, Limited, other than lands, buildings or hereditaments, and the interest of the Imperial Company in a factory at Shanghai recently purchased by it and in the American Cigarette Company of Shanghai should be included.

It was further provided : " 6. The British-American Company shall have the right to use in its export business, as hereinbefore defined, any brands and trade-marks now owned or hereafter acquired or adopted by any of the parties hereto of the first six parts."

Various other provisions with regard to details are set forth in the agreement.

It is further provided that the purchases shall be completed on or before the first day of January, 1903, in London and the consideration for the same shall be paid or satisfied subject to the provisions of this agreement.

Each of the parties to the agreement of transfer covenants with the British-American Company that it will not at any time after its transfer day carry on or be employed or interested in export business as defined in this agreement, except as it may be interested as a member of the British-American Company, or of any company formed or to be formed with the concurrence of the British-American Company, and there is a corresponding covenant by the British-American Company that it will not carry on or be engaged or interested in the business of a tobacco manufactory or in any dealing in tobacco or its products, except in the manner and within the limits contemplated and authorized by this agreement.

It is further provided: "20. *This agreement is to be construed and take effect as a contract made in England and in accordance with the law of England.*"

The provisions of this agreement were carried out. The British-American Company was duly organized under the laws of England, and the transfers called for by the agreement were made by the various parties to the agreement. There were issued to the Imperial Company £300,000 of ordinary shares of the British-American Company, Limited, and there were issued to the other Companies £600,000 of ordinary shares of the British-American Company, Limited, for which cash was paid to the British-American Company, Limited in accordance with Clause 3 of the agreement by the various Companies. Out of the cash thus provided the British-American Company paid for the factories and plants transferred to it by the various Companies. *The amount paid to the Imperial Tobacco Company on actual inventory for its various factories, plants, machinery and material and tangible assets was £607,694, 11s. 11d., amounting to over $3,000,000* (Record, Vol. IV., pp. 738–9). In addition,

the Imperial Company parted with its good will and labels, the right to use the trade-marks and labels in connection with its export business and also parted with certain stock of certain Companies that were engaged in the export business, and in return for these intangible assets, good will, labels and stock it received an amount of capital stock of the British-American Company as provided by the agreements, namely, £940,000 (Record, Vol. IV., p. 739). The result of the transactions was that the American Company and its allied Companies received two-thirds of the capital stock of the British-American Company and the Imperial Company received one-third.

All these transactions took place in England.

Since the making of these agreements the business of the British-American Company has been carried on in accordance with said agreements. So far as concerns the export business from the United States to foreign countries, other than Great Britain, *the operations of the British-American Company, so far from restraining or diminishing trade, have resulted in a large increase.* More leaf and more manufactured tobacco are exported from the United States to-day than were exported before 1902 by the American Companies and the Imperial Company combined.

These facts are not disputed by the Government.

The price of leaf tobacco and the demand for leaf tobacco in the United States have increased since 1902.

Counsel for the Government state in their brief that "a strong but unsuccessful effort has been made to establish the existence of real competition between it (the Imperial Company) and the American Company." We submit that the "effort" has not only been "strong" but "successful" and that the evidence overwhelmingly establishes the existence of *real competition* between the Imperial and the American Companies in the purchase of leaf tobacco.

The agreement itself (Exhibit 1) between the Imperial and the American Companies expressly reserves the right of the Imperial Company "*to buy and treat tobacco leaf*" in the United States (see Paragraph 15 of the Agreement).

Every witness examined in the suit (witnesses for the Government as well as witnesses for the defense) testifies that the Imperial Company at all times from 1902 to the present time, purchased through its own agencies and in direct competition with the American Company, and that there was no agreement or understanding, express or implied, between the two Companies or their agencies to refrain from competition or to agree on prices of leaf tobacco.

Counsel for the Government in their brief (p. 171) state:

> "When this Company (the Imperial Company) and the American were in real competition in 1902, prices in the Carolinas and Virginia were very high (R. IV., 241, 242, 264, 265 and 271) notwithstanding the large crop; in 1903 they fell below cost of production. The average for 1902 was not again reached until 1907, notwithstanding the declining production (R. IV., 269)."

The facts as shown by the testimony are quite at variance with the implications of this statement. The references in the brief to the record are to the testimony of Mr. Carlton, the agent of the Imperial Company. It appears from the testimony of Mr. Carlton and from the tables introduced in evidence that there was a slump in the price of tobacco in 1903, which was partly accounted for by overproduction and partly by a reaction from unfair and ruinous competition of the preceding year. The average price in 1902 was 9.98 cents. It fell in 1903 to 6.31. It does not appear from the evidence what the cost of production was. In 1904, however, the price rose to 8.59 and from that time the rise was steady until in 1907 it had risen to 10.30. (See p. 269). So far, however, was there from being an absence of competition that it appears that during this period the Imperial Company paid in 1902, 10.41; in 1903, 7.19; in 1904, 10.20; in 1905, 8.76; in 1906, 10.38, and in 1907, 11.44, being in excess for each year of the prices paid by all other purchasers.

The Exhibit annexed to brief of counsel for the Government, Appendix C, is quite at variance with the statement of

counsel in their brief. That Exhibit shows that the average farm price per pound was as follows: 1900, 6.6 cents; 1901, 7.1 cents; 1902, 7 cents; 1903, 6.8 cents; 1904, 8.1 cents; 1905, 8.5 cents; 1906, 10 cents; 1907, 10.2 cents; 1908, 10.3 cents. (See, also, Brief, p. 220.)

Not a single farmer or producer of tobacco in the United States was called as a witness by the Government to show that the producers have any grievance against the American Company or the Imperial Company, or that they have suffered by lack of competition.

On these facts we claim—

I. The agreements of September 27, 1902, were not in violation of the so-called Sherman Anti-Trust Act.

II. So far as an intent to violate the provisions of that law might be a matter of inference from some of the provisions of the agreements, the oral testimony shows that the agreements did not and could not, under the existing circumstances, operate to restrain trade or create a monopoly, and therefore, could not and did not operate as a violation of the Sherman Anti-Trust Act and were not intended so to operate, and were not the result of any conspiracy to violate the Act.

III. So far as the Bill of Complaint herein avers that there was any restraint of competition in the purchase of leaf tobacco, either by reason of the written agreement, Exhibit 1, or by reason of any other agreement, arrangement or understanding, or any practice outside of the written agreement, the evidence overwhelmingly disproves any such claim.

IV. No decree can be made in this suit as against the Imperial Company which will be just and equitable.

V. Neither Exhibit 1 nor Exhibit 2 violates the spirit of the statute by raising the price to consumers, lowering the price to producers or preventing competition.

PRELIMINARY POINT.

Before taking up the above propositions in their order, we desire to call the attention of the Court to the fundamental proposition which is to be borne in mind in considering the legality or illegality of the agreements made with the Imperial Company. This fundamental proposition is that *the Sherman Anti-Trust Act does not, and cannot have, and was not intended to have any extra-territorial effect.* It is based on the Commerce Clause of the United States Constitution, namely, the clause authorizing Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes" (Constitution, Art. I., Sec. 8, Subdiv. 3).

Section 1 of the Sherman Anti-Trust Act of July 2, 1890, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the Court."

It is perfectly clear that this Act is not intended to and cannot operate to render illegal a contract which is in restraint of trade or commerce within the United Kingdom of Great Britain and Ireland, or in restraint of trade and commerce between that kingdom and countries other than the United States of America, and it is equally clear that if the statute should be interpreted as undertaking to declare illegal such contracts it would be unconstitutional and void.

The fact that a contract operating to restrain trade or commerce within the United Kingdom of Great Britain and Ireland, or between that kingdom and other countries than the United States of America, is entered into by American corporations or American citizens, does not bring the contract

within the purview of the Act of Congress. It is only when a contract affects "commerce with foreign nations [that is to say, commerce between the United States and foreign nations] and among the several States and with the Indian tribes" that Congress has any constitutional power "to regulate" the subject matter of such a contract.

This fundamental proposition seems to us so self-evident as not to admit of discussion or argument.

If there ever was any question about it, the case of *American Banana Company vs. United Fruit Company*, recently decided by this Court (213 U. S. 347) disposes of the question. In that case it was held that "the prohibitions of the Sherman Anti-Trust Law of July 2, 1890, c. 647, 26 Stat., 209, do not extend to acts done in foreign countries even though done by citizens of the United States and injuriously affecting other citizens of the United States."

The Court say, per Mr. Justice HOLMES (p. 355):

> "It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other States. It is surprising to hear it argued that they were governed by the Act of Congress. * * * But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. * * * For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions, rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. * * * Words having universal scope, such as 'every contract in restraint of trade' 'every person who shall monopolize,' etc., will be taken, as matter of course, to mean everyone subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute, the improbability of the United States attempting to

make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."

The statute of the United States, on which the Government relies, having no extra territorial efficacy it follows that the contracts made in England must stand or fall by the common law, so far, at least, as regards their operation upon property located in England or trade carried on in England or between England and countries other than the United States.

Counsel for the Government contend that "there is no proper evidence in the record to prove the law of England," and insist that the courts of one country cannot take cognizance of the law of another without proof. It was not necessary for us to prove that the agreements in question were valid under the law of England. Their validity will be presumed, unless the contrary is shown. In the absence of proof, the presumption is in favor of the legality of the agreement.

Even, however, if it had been incumbent upon us to establish the proposition that the contracts were lawful in England, we had a right to rely upon the common law principles of which the Courts of this country will take judicial notice.

Moreover, even if the contracts were invalid at common law, that circumstance would not entitle the Government to a decree in this suit, since this is a suit brought not to restrain the enforcement of the contracts because void at common law, but to restrain the enforcement of the contracts as void under the statute. This suit must, therefore, stand or fall upon the construction of the Sherman Act, and that Act, as we have seen, has no extra territorial effect.

We do not, of course, dispute the proposition insisted on by the Government that a foreign corporation, doing business within the jurisdiction of the United States, has no license or immunity to violate the policy or laws of the United States, and we do not claim that the mere fact that the agreements in question were actually made in a foreign country affords any justification for violating the laws of this country. Our point is, that, so far as the agreements concern transfers of property

in England or restraint of competition *in England* or between *England* and *foreign countries*, the Sherman Act has no application.

On the other hand, so far as concerns business between this country and England or other foreign countries, or between the various States, the proof shows that there is *no actual* restraint of trade, and *no intent to restrain trade* within the meaning of the Sherman Act, as we shall hereafter point out, more at length.

[In the following discussion, we shall designate for the purpose of brevity as the American Company, the corporation known as The American Tobacco Company and its allied Companies.]

We shall not discuss in this brief the general questions as to the true construction and application of the Sherman Act and as to what classes of contracts do and what classes of contracts do not come within the prohibition of that Act as being contracts in "restraint of trade" or tending to create a "monopoly." Nor shall we discuss the question as to whether the American Tobacco Company or any of its constituent or allied companies has or has not violated the statute. These questions are both interesting and important, but they have been so fully and so ably discussed by counsel for the American Tobacco Company in their brief that further discussion by us is superfluous. Suffice it to say that we concur in their views as to the legality of the steps by which these various companies have acquired their property and developed their business and as to the legality of the business now carried on by them.

So far, however, as concerns The Imperial Tobacco Company, it is not necessary for us to go into these questions. All that is necessary for us to do is to show that the two contracts to which The Imperial Company is a party are not in violation of the Sherman Act.

POINT I.

The agreements of September 27, 1902, were not in violation of the so-called Sherman Anti-Trust Act.

(A) The American-Imperial Agreement.

The primary and principal object of this Agreement was the sale of the property of the Ogden's Limited, *an English corporation*, carrying on the business of manufacturing and selling tobacco products *in England*, to The Imperial Company of Great Britain and Ireland, Limited, *another English corporation*, carrying on the business of manufacturing and selling tobacco products *in England*.

In order to carry out and effectuate this sale mutual covenants were entered into between The Imperial Company on the one hand, and The American Company on the other hand, intended to effectuate a purchase of the good will of the Ogden Company from the American Company. These covenants, so far as they are in restraint of trade in England, are, of course, outside of the scope of the Sherman Act under the general principles above stated. So far as they operate to restrain trade between England and this country, or between the various States of this country, they are merely incidental to the sale itself and are not within the intent and meaning of the Sherman Act under the decisions, to which we shall hereafter call attention. The evidence shows that there was, in fact, no restraint of trade resulting from this contract, as between England and this country, or as between the various states of this country, since the differentials imposed in England upon tobacco products imported from this country, and the protective tariff imposed by Congress upon tobacco products imported into this country, made commerce in tobacco products between the two countries so unprofitable as to be practically impossible. See Statement of Facts, *supra*.

It is charged in the Bill of Complaint or Petition that The Imperial Company had established a monopoly of the tobacco business in Great Britain. Even if this charge were substantiated by the proof, it would be of no consequence in this case.

It cannot be seriously contended that Congress intended to prohibit monopoly of business in any foreign country, or that it had any constitutional right to do so (see Preliminary Point, *supra*).

There is, however, no basis for the charge that the formation of The Imperial Company and the sale of the Ogden's Limited to The Imperial Company, created a monopoly in the business of manufacturing or selling tobacco products in Great Britain. The fact is otherwise.

The Answer of the defendant The Imperial Tobacco Company expressly denies this charge. The Answer sets forth—

> "This defendant denies that it was formed for the purpose of destroying competition or that the effect of its formation has been, to destroy competition among the English manufacturers of tobacco, or that it has at all times or at any time since its formation controlled or monopolized the manufacture of or trade or commerce in such products or the leaf tobacco necessary therefor, with or within the United Kingdom, and this defendant avers that there is and at all times has been keen competition in the United Kingdom between it and other manufacturers." (Answer of The Imperial Company, fols. 27 to 29.)

The only attempt on the part of the Government to establish the allegation of monopoly in England was by a question put to Mr. Harris while on the witness stand as a witness for the Government, and his answer denied any knowledge that The Imperial Company had or has any monopoly (Record, Vol. II., pp. 23, 24).

Assuming, however, as heretofore postulated, that the sale of one English Company to another English Company of a manufacturing establishment and business in England cannot be brought within the prohibition of the Sherman Act, even though such sale results in a monopoly, and assuming that the covenant by the American Company and its allied Companies not to manufacture or sell in Great Britain, was not a violation of the Sherman Act, because it had to do entirely with trade in a foreign country, we come to the only question remaining, namely, whether the corresponding covenants by The

Imperial Company not to manufacture or sell in this country are within the prohibition of the Sherman Act. We respectfully submit that there is no substantial basis for such a claim. These covenants by The Imperial Company are only the necessary and proper equivalents of the covenants by The American Company on behalf of the Ogden's Limited and are but the necessary and proper method of effectuating and giving value to the transfer by The Imperial Company to the American Company of the right to use in America the brands, labels and trademarks of The Imperial Company.

We shall discuss hereafter the practical results of these covenants and shall show that there was, in fact, no restraint of trade between the two countries or between the several States by reason thereof. We submit, however, that the covenants themselves were not violations of the Sherman Act, inasmuch as they were only incidental to the carrying out and effectuating of a sale of good will, which sale was itself proper and lawful.

(1) Notwithstanding the very broad language used by this Court in construing the Sherman Act, we submit that the Court has recognized that *there are certain contracts in partial restraint of trade which would not be invalid at common law and which do not come within the prohibition of the Sherman Act.*

(a) This principle has been recognized in the very cases in which this Court has been understood to have held that all contracts in restraint of trade, whether reasonable or unreasonable, are in violation of the Sherman Act.

Thus in the case of *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290, it is said by Mr. Justice PECKHAM:

> "The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimation in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

Again he says, at page 329:

> "*A contract which is the mere accompaniment of the sale* of the property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is *collateral to such sale*, and where *the main purpose* of the whole contract is *accomplished by such sale*, might *not* be included *within the letter or spirit of the statute* in question."

The expressions of Mr. Justice PECKHAM in the opinions of this Court in the two cases of *U. S. vs. Trans-Missouri Freight Association*, 166 U. S., 290, and *U. S. vs. Joint Traffic Association*, 171 U. S., 505, to the effect that contracts in restraint of trade are invalid under the Sherman Law, whether "reasonable" or "unreasonable," are to be taken in connection with the qualifications of the learned Justice himself, especially as set forth in the opinion in the *Joint Traffic* case.

In that case (171 U. S., 566), Mr. Justice PECKHAM, delivering the opinion of the Court, says:

> "In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.
>
> "As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on

commission; the purchase by one wholesale merchant of the product of two producers; *the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop;* the withdrawal from business of any farmer, merchant or manufacturer; *a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business;* and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

"This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

"*We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business.* * * * We also repeat what is said in the case above cited, that '*the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some*

bearing upon interstate commerce, and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

It will be observed that the learned Justice expressly states that the statute is to have a "*reasonable construction.*" The test of reason must be applied to this statute, as to every other statute, by the Court. It must be assumed by the Court that Congress intended to pass a workable and reasonable statute, and not an unworkable and unreasonable one; that Congress intended to pass a statute which would be beneficial to the community, and not a statute which would be disastrous and ruinous in its application.

To construe this statute literally as rendering invalid every contract which restrains competition, would render illegal the classes of contracts referred to by Mr. Justice PECKHAM in his opinion and would produce chaos in the business world. This statute never has been, and never can be literally and strictly applied. Giving it a reasonable construction, the classes of contracts referred to by Mr. Justice PECKHAM must be excluded. The agreements between the American Company and the Imperial Company come clearly within one of the classes of exceptions mentioned by Mr. Justice PECKHAM, namely, the sale of a factory and plant and good-will with accompanying covenants against competition.

What Mr. Justice PECKHAM really meant when he laid down the rule that contracts in restraint of trade were invalid within the meaning of the act, whether reasonable or unreasonable, is shown further by his explanatory statement in the *Joint Traffic* case. The expression is to be limited to contracts between railroads, engaged in interstate commerce, carrying on a public business, and charged with the duty of competition. In the case of public service corporations of that character any contract restraining competition, or putting it in the power

of the parties to restrain competition, is a violation of the Sherman Law, whether in the opinion of the Court it is "reasonable" or "unreasonable," beneficial or injurious, wise or unwise.

Mr. Justice PECKHAM says (171 U. S., 568):

> "*The question really before us is* whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint of interstate commerce, *a contract or combination between competing railroad corporations* entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, *even though the rates and fares thus established are reasonable.* Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. * * *.
>
> "Has not Congress with regard to interstate commerce and in the course of regulating it, *in the case of railroad corporations*, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has."

The learned Justice proceeds to discuss at length the nature of the franchises of a railroad, and on page 570 he says:

> "We do not think, when the grantees of this public franchise are *competing railroads* seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for the time be not

more than are *reasonable.* They may easily and at any time be increased. It is the *combination of these large and powerful corporations* covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

It will, therefore, be seen that the dicta of the Court in the *Traffic* cases with regard to " reasonable " and " unreasonable " contracts in restraint of trade are to be limited strictly to contracts between railroad or other public service corporations, and have no application to contracts between private corporations. The language of Mr. Justice HARLAN'S opinion in the *Northern Securities* case, 193 U. S., 197, is likewise to be limited to contracts between Railroad Companies, especially in view of Mr. Justice BREWER'S concurring opinion. The distinction between contracts between public service corporations and private individuals or corporations is clearly laid down in *Gibbs vs. Baltimore Gas Co.*, 130 U. S. 396, where it is held that a corporation cannot disable itself by contract from the performance of *public duties* which it has undertaken, and thereby make public accommodation or convenience subservient to its private interests ; but where the *public welfare* is not involved and where the restraint upon one party is not greater than protection to the party requires, a contract in restraint of trade may be sustained.

(b) From other opinions of this Court, also, it is clear that contracts of the nature of the agreements involved in this suit between the American Company and the Imperial Company, are not within the prohibition of the statute.

In *Northern Securities Company vs. U. S., 193 U. S., 197,* Mr. Justice BREWER says at page 361 :

> " *Congress did not intend to reach and destroy those minor contracts in partial restraint of trade* which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose

rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy."

In *Cincinnati Packet Company vs. Bay, 200 U. S., 179*, it is said by Mr. Justice HOLMES at page 184:

"It is argued, to be sure, that the last mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words 'it is also agreed as a part of the consideration of this agreement.' *By these words the covenant not to do business* between Cincinnati and Portsmouth for five years is *imported into the sale* of the ships, and made one of the conventional inducements of the purchase. *The price is paid not for the vessels alone but for the vessels with the covenant.* So, still more clearly, the parallel installments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale.

"Presumably all that there was to sell, beside certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

"This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been *no intimation from any one*, we believe, *that such a contract, made as part of the sale of a business* and not as a device to control commerce, *would fall within the act.* On the contrary, it has been *suggested repeatedly* that *such a contract is not within the letter or spirit of the statute (United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 329, *United States v. Joint Traffic Association*, 171 U. S., 505, 568), and it was so decided in the case of a patent. *Bement v. National Harrow Co.*, 186 U. S., 70, 92. It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to

> elude performance of their undertakings if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed."

The doctrine laid down in *U. S. vs. E. C. Knight Co.*, 156 U. S., 1, has never been overruled, although it has been distinguished by the later cases where the testimony showed a different state of facts and showed an agreement or combination intended to interfere with trade or commerce between the States. It still remains true, as stated in the *Knight* case, by Chief-Justice FULLER, at page 16:

> "It was in the light of well-settled principles that the act of July 2, 1890, was framed. *Congress did not attempt* thereby to assert the power to deal with monopoly directly as such; or to *limit and restrict the rights of corporations* created by the States or the citizens of the States *in the acquisition, control, or disposition of property;* or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; *or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted.*"

In the opinion delivered by Judge TAFT (concurred in by Mr. Justice HARLAN and Judge LURTON) in the U. S. Circuit Court of Appeals in the *Addyston Pipe Case*, 85 Fed. Rep., 271, the validity of covenants is recognized which are ancillary to some lawful contract, such as that of *vendor and vendee* and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract. The subject is exhaustively discussed and the authorities reviewed by Judge TAFT.

The decision in that case was modified and affirmed by this Court in 175 U. S., 211, without any disapproval of the opinion below.

(c) The decisions of the State Courts in construing the Sherman Act are equally clear on this point.

In *Brett vs. Ebel*, 29 N. Y. App. Div., 256, a party sold "all his interest and good-will in the business of freighting vessels for Port au Prince and said Brett's Line, Haiti Packets," and for a time mentioned agreed not to solicit freights nor do any business with Port au Prince, in consideration of a certain sum to be paid to him. *Held*, the contract in question involved no unreasonable restraint of trade, nor was it invalid under the Federal Anti-Trust Act, as the restraint in question was *merely ancillary to a lawful contract* and was designed only to prevent the vendor from competing with the purchaser within a limited area.

BARRETT, J., says, at page 259: "It was held by the Supreme Court of the United States in the case of *U. S. vs. Trans-Missouri Freight Association* (166 U. S., 290) that these prohibitory provisions apply to all contracts in restraint of interstate or foreign trade or commerce, without exception or limitation; and that they are not confined to those in which the restraint is unreasonable. The opinion in that case, however, must be read in the light of its facts. The contract there was not founded upon or connected with any sale of property or good will. Thus the restraint was not ancillary to any lawful contract. The particular contract there under consideration was one which was entered into between competing railroads for the purpose of thereby affecting traffic rates for the transportation of persons and property. We find nothing in the opinion to warrant the extreme view taken by the defendants here. On the contrary, we find language suggestive of the opposite and certainly the more reasonable view.

"'A contract,' said Judge PECKHAM (at p. 329), 'which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question.'

"It should be observed that the act which was there under consideration was entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.' The word 'contract' in the 1st section is joined with the words 'com-

bination' and 'conspiracy,' thus plainly indicating the mischief aimed at by Congress. The history of that act emphasizes this view. It was clearly aimed at the so-called 'trusts' or monopolies now so familiar in this country, whose main object was the restraint of trade. The intention was undoubtedly to declare every contract illegal which was in the line of these evils. *But it certainly was not intended to prohibit a man from selling his business in the ordinary way and from thereupon obtaining the full value thereof through the instrumentality of an incidental covenant not to compete with the purchaser within some limited area.*"

The question of the legality of the contract under the Sherman Act was directly raised in that suit which was an action upon the contract in which the defendant pleaded illegality under the Act of Congress. This decision is therefore in no sense a *dictum.*

In *Lanyon vs. Garden City Sand Co.*, 223 Ill., 616; 79 N. E., 313, a contract between one Lanyon of the first part, one Heber and one Bonebrake, of the second part, and Garden City Sand Co., of the third part, and Hillsdale Fire Brick and Clay Company, of the fourth part, and one J. B. Warner and one Maria Warner, of the fifth part, provided as follows: Heber and Bonebrake, of the second part, to mine, grind and operate for Lanyon, of the first part, his fire clay grinding plant located at Jonesdale Switch, Indiana. The first and second parties agreed to deliver at said place first-class marketable fire clay at a certain price, in such quantities and at such times as the third, fourth and fifth parties might order. The first party agreed to erect and equip a new plant at his own expense for the grinding of the clay, and the second parties were to give their individual personal attention to the operation of the plant. The first party also agreed *not to operate any other fire clay grinding plant* on any land that he owned or controlled in the State of Indiana, and the first and second parties agreed *not to sell fire clay* to any other persons than the third, fourth and fifth parties during the time of the contract. The second, third, fourth and fifth parties agreed to *cease to operate a certain plant* located at Russell Switch, Indiana, but in case the new plant could not supply the demand, the old plant at Russell

Switch was to be reopened. The third, fourth and fifth parties agreed that they *would not buy fire clay produced in the State of Indiana, except such as was produced by the parties to the contract,* and they would make the greatest possible effort to sell all the fire clay so produced, and would jointly order and pay for not less than an average of 40 tons for every working day during the period of the contract, for which they were to pay 77½ cents per ton, and not enter into any combination or trust for the purpose of limiting the output of either plant.

It was held by the Supreme Court of Illinois, affirming the judgment of the Appellate Court, that this contract was *not in violation of the Federal Anti-Trust Act,* and that plaintiff was entitled to relief by way of injunction to restrain the violation of the covenants of the contract.

The Court say, per WILKIN, J.:

> "The first question discussed in the argument of counsel is whether the agreement of September 10, 1901, is a valid contract, as was held by the Appellate Court, or is in restraint of trade and violative of the anti-trust law of this State or of the United States, as found by the Superior Court, and therefore void. The appellants, in support of the latter contention, insist mainly upon that part of the contract by which the first party agrees not to operate any other fire clay grinding plant on any land owned or controlled by him in the State of Indiana, or to sell to any other person during the time of the contract, and in which the third, fourth and fifth parties agree not to buy fire clay produced in that state other than from the first and second parties."

The Court then proceeds to quote the language of the Federal statute and of the State statute, and proceeds:

> "The object of these statutes is to prohibit the formation of trusts and combinations and remove all obstructions in restraint of trade and free competition. It was not the purpose of either law to hinder or prohibit contracts on the part of corporations or individuals made to foster or increase trade or business. But a contract may incidentally restrain competition or trade, without violating the statutes, if its chief purpose is to promote and increase the business of those who enter into it. * * * Such contracts usually

grow out of sales of property with the good will of a business, profession, partnership, etc., but they are not confined to such contracts. Speaking of Federal statutes in the well-considered case of *Whitwell v. Continental Tobacco Co.*, 125 Fed., 454, C. C. A., 290, 64 L. R. A., 689, it is said: 'If it (the contract) promotes or accidentally restrains competition, while its main purpose and chief effect are to foster the trade and increase the business of those who made and operated it, then it is not a contract, combination, or conspiracy in restraint of trade within the true meaning of this act, and is not subject to its denunciation.'"

[This quotation from the Whitwell case is verbally inaccurate. The exact language of the Court is: "If on the other hand, it promotes or but *incidentally or indirectly restricts competition*, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is *not a contract, combination or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation.*" See opinion of SANBORN, Cir. J., 125 Fed. Rep., 458.]

"Naturally the several interests of these parties drew them together and prompted them to make the contract in question. *It was of mutual benefit and advantage to each of them.* Without it each party would labor at a disadvantage and fail to realize the full limit of his or its resources and opportunities. The contract seems just and reasonable in the light of these facts. *The corporations might reasonably refuse to enter into the contract or purchase the 40 tons of fire clay daily, unless they could be protected against the selling of the same product by Lanyon in competition with them.* * * * Considering the contract as a whole in the light of the facts surrounding the parties, we are of the opinion that it is not invalid, that the object of it was to foster and establish a legitimate business, and, although to a limited extent it may have restrained competition, there was not such a limitation or restriction as should defeat its validity under the law."

To the same effect, see as to construction of the "Sherman Anti-Trust" Law;

Bancroft & Rich vs. Union Embossing Co., 72 N. H., 402; 57 Atl., 97.

Harbison-Walker Refractories Co. vs. Stanton, 227 Pa., 55; 75 Atl., 55.

(2) It was *held*, as we have above pointed out, by Mr. Justice BREWER in his concurring opinion in the Northern Securities case (193 U. S., 361), that "Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and fit to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy."

In view of the limitations placed upon the effect of the Statute in Mr. Justice PECKHAM'S opinion in the Trans-Missouri case, *supra*, we may fairly assume the statement made by Mr. Justice BREWER to represent the views of this Court, especially as to contracts of a mercantile character not affecting railroads or other direct instruments of commerce.

The "contracts in partial restraint of trade" which have been approved by the "long course of decisions at common law" clearly include the American-Imperial Agreements, which are therefore exempt from the prohibitions of the Sherman Anti-Trust Law.

(a) The subject of contracts not in restraint of trade at common law prior to the Act of 1890 is discussed by this Court in the following cases:

In *Oregon Steam Navigation Co. vs. Winsor*, 20 Wall., 64, the sale of a steamer subject to a stipulation with the purchaser not to run or employ, or suffer to be run or employed, the said steamer in the waters of the State of California for ten years from the date of sale, was held to be not void as in restraint of trade.

In *Gibbs vs. Consolidated Gas. Co.*, 130 U. S., 396, 409, it is said by Mr. Chief Justice FULLER:

> "The decision in *Mitchel v. Reynolds*, 1 P. Wms., 181: S. C. Smith's Leading Cases, Vol. I., Pt. II., 508, is the foundation of the rule in relation to the invalidity

> of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable (*Rousillon v. Rousillon*, 14 Ch. D., 351; *Leather Cloth Co. v. Lorsont*, L. R., 9 Eq., 345; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall., 64, 68)."

This language is quoted with approval and is followed in *Fowles vs. Park*, 131 U. S., 88, 96.

(*b*) The lower Federal Courts have decided numerous cases to the same effect, both before and since the Sherman Act, and have upheld contracts *the avowed object of which was to buy off the competition of a business rival.*

Thus in *Carter vs. Alling*, in the Circuit Court for the Northern District of Illinois, 43 Fed. Rep., 208, a contract was upheld between a manufacturing corporation whose business extended throughout the United States and Canada, and one of its travelling salesmen, whereby he agreed not to enter the service of any business competitor of the corporation for three years after leaving its service, the Court saying, per BLODGETT, J., at p. 214:

> "The modern agencies of commerce have enlarged the field for the manufacturer and salesman to, or *even beyond the limit of the continent* and to whatever extent a manufacturer or dealer has by his energy and enterprise made a market for his wares, to that extent *he has the right to protect his business from piratical competition by contracts like the one under consideration.*"

In *United States Chemical Co. vs. Provident Chemical Co.*, in the Circuit Court for the Eastern District of Missouri, 64 Fed. Rep., 946, it appeared that the plaintiff was engaged in the manufacture of bone tartar. It leased its building and equipment used in such manufacture to one W. with a covenant that during its continuance the plaintiff company would not engage in the manufacture of bone tartar. On the day the lease was made it was assigned with the consent of the plaintiff to the defendant Company which was engaged in the same business and had for many years been the chief producer of bone tartar. It appeared that the lease had been made with the intention that it should be assigned to the defendant Company, and that it was made for the purpose of removing the plaintiff's competition from the market. It was held that as the contract conferred no special or exclusive privilege, but left the trade open to the competition of any other parties, it had no tendency to create a monopoly; that it was no more than a lawful exercise of the power to contract for the protection of the business of the defendant Company and was not against public policy, nor void, the Court saying:

> "The sense of the modern decisions is that, if the restraint is only commensurate with the fair protection of the business sold, the contract is reasonable, valid, and enforceable. It is only where the restriction can be of no avail to the vendee, and unnecessarily hampers the vendor, that it becomes oppressive and void."

The Court says further that "*the defendant had a perfect right to buy off the competition of a dangerous, powerful and aggressive rival*," and again:

> "Our attention has been called to many cases which condemn, in perhaps not too severe terms, combinations and trusts. *It is a nervous and alarmed imagination which sees in every transaction involving large exchange of properties a monster threatening public interests.* Combinations in the nature of modern trusts, so soundly condemned, are those which aim at a union of energy, capital and interest to stifle competition and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of *exchange of one valuable right or thing for another.*"

In *Harrison vs. Glucose Sugar Refining Co.*, Circuit Court of Appeals for the Seventh Circuit, 116 Fed. Rep., 304, it is said by JENKINS, Circuit Judge, at page 308 :

> " It is urged that the contract in question is one in restraint of trade because of the covenant that during the stipulated time of service the appellant would not, directly or indirectly, become interested in the specified business within a radius of 1,500 miles from the city of Chicago otherwise than under his engagement with the appellee. The doctrine of restraint of trade had its birth in conditions anciently obtaining, and now greatly changed. Then the area of trade was confined within narrow territorial bounds. Intercommunication has become largely extended, and trades anciently limited to a small locality have become national in their extent. The rule is bottomed upon the consideration whether such a covenant was broader than the covenantee required for his protection."

In *National Enameling & Stamping Co. vs. Haberman* in the Circuit Court for the District of Connecticut, 120 Fed. Rep., 415, it was held that a restrictive covenant *unlimited as to time* and *in area covering the entire United States*, but which was ancillary to the main lawful contract, being in part consideration of the payment for *good will sold* was reasonable and no broader than is necessary to save to the covenantee the rights and privileges for which he has paid.

Judge PLATT reviews quite fully the authorities up to date in a very able, instructive and entertaining opinion.

In the very recent case of *Prame vs. Ferrell* (Cir. Ct. of App., 6th Cir.), 166 Fed., 702 (LURTON, SEVERENS and KNAPPEN, JJ. concurring) it was held that a covenant by a partner on the sale to his co-partner of his interest in the property and good-will of the partnership, not to engage in the same business, was a valid covenant, though without limitation as to time or territory, it appearing that the partnership was engaged in the manufacture of an article then sold generally throughout the United States. The Court held that, construing the agreement as covering the United States, it was reasonable and enforceable.

In that case a petition for *certiorari* was denied by this Court, 215 U. S., 605.

See also *Walker vs. Lawrence*, (Cir. Ct. of App., 4th Cir.), 177 Fed., 363.

(c) At common law any contract, whereby one of the parties agrees to refrain from competition with the other party, was technically known as a "contract in restraint of trade." *Such contracts, however, were not necessarily unlawful. A contract in "partial" restraint of trade was lawful.* A contract in "general" restraint of trade was unlawful. We submit that it must be held that *contracts, although in partial restraint of trade, if valid at common law and if not a cover for a combination or conspiracy to raise prices or to prevent general competition, are not invalid under the Sherman Act.*

The authorities above cited from the Federal Courts under (*a*) and (*b*) show how far these Courts have gone in upholding the validity of contracts in partial restraint of trade,—even where the direct purpose and the necessary effect is to limit competition,—even to the extent of buying off "the competition of a dangerous, powerful and aggressive rival" (64 Fed. Rep., 946, 950).

The leading authorities in other Courts as to the common law rule are fully reviewed in the case of *Gibbs vs. Consolidated Gas Co.* (130 U. S., 396, *supra*). This Court cited with approval the then recent cases in England of *Rousillon vs. Rousillon* (14 Ch. D., 351) and *Leather Cloth Co. vs. Lorsont* (L. R., 9 Eq., 345). This Court also, in the *Gibbs* case, drew a clear line of distinction between contracts which would be illegal as between public service corporations, such as Gas Companies or Railroad Companies, which are affected with a public interest and contracts between individuals or corporations carrying on a private business "where the public welfare is not involved and the restraint upon one party is not greater than protection to the other party requires."

In the case of *Leather Cloth Co. vs. Lorsont*, L. R., 9 Eq. Cases, 345, it appeared that upon the formation of a Company for the purchase and working of a certain process of manufacture introduced into England from America, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they to the best of their power allow to be carried on by others *in any part of Europe* any company or manufactory, having for its object the

manufacture or sale of productions now manufactured in the business or manufactory" of the vendors.

The Court held that the restriction contained in this clause was not greater, having regard to the subject matter of the contract, than was necessary for the protection of the purchasers and was capable of being enforced against the vendors.

In *Rousillon vs. Rousillon*, 14 Ch. Div., 351, a general contract not to engage in the sale of champagne without limit as to space was held to be enforcible.

In the case of *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co.*, L. R. (1894), Appeal Cases, 535, the House of Lords reviewed at great length and in elaborate opinions the whole subject of covenants in restraint of trade. The contract before the Court was a covenant by a patentee and manufacturer of guns and ammunition with a company to which he had transferred his patent and business, that he would not for twenty-five years engage, except on behalf of the company, either directly or indirectly in the business of a manufacturer of guns or ammunition. The Court held unanimously, affirming the decision of the Court of Appeals, that the covenant, though *unrestricted as to space*, was not, having regard to the nature of the Governments of Great Britain and other countries, and to the nature of the business and the limited number of customers, wider than was necessary for the protection of the company, nor injurious to the public interests of this country (Great Britain); that it was therefore valid and might be enforced by injunction.

The leading opinion is delivered by Lord Chancellor HERSCHELL, who says at page 541:

> "In early times all agreements in restraint of trade, whether general or restricted to particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restriant of trade was only partial."

The Lord Chancellor calls attention to the change of conditions since the earlier times, when these decisions were made, and particularly calls attention to the fact that various businesses are co-extensive with the Kingdom, and then proceeds to lay down the true rule which should prevail, as follows (page 548):

> "Whether the cases in which a general covenant can now be supported, are to be regarded as exceptions

from the rule which I think was long recognized as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular, the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law. *I think that a covenant entered into in connection with the sale of the good-will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser.*

And, again, at page 549:

"*If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory.* The only customers of the respondents must be found amongst the Governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another. So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. *They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad.* They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part *I see nothing injurious to the public interests of this country in upholding such a covenant.*"

This decision of the House of Lords, we may remark in passing, settles the law of England where these contracts

were entered into and *sustains the validity* of the covenants contained in Exhibit 1 and Exhibit 2, *so far as the law of England is concerned.*

The authorities in the State Courts in this country are equally pertinent to the case at bar. The contracts between the American and the Imperial are clearly valid under the rules laid down by the Courts.

In the leading case of *Diamond Match Co. vs. Roeber*, 106 N. Y., 473, defendant was engaged in the manufacture in New York and sale throughout the States and Territories, of friction matches. He sold his factory and good-will to a corporation engaged in the same manufacture in Connecticut, Delaware and Illinois, selling its manufactures throughout the country. The bill of sale contained a covenant not to engage within 99 years in such manufacture or sale, except in the service of the purchasing company, within any of the States or Territories, except Nevada and Montana. The Court takes advantage of this exception to hold that the restraint was partial and not general, declining to rule that the exception of Nevada and Montana was "colorable merely."

The *dicta* of the Court, however, clearly indicate that, had it been necessary to the decision, the Court would have sustained a covenant covering the whole country, if such a covenant were necessary in order to protect the interest of the covenantee.

The Court reviews the decisions up to date and holds that "while the early doctrine of the common law that contracts in general restraint of trade are void, without regard to circumstances, has not been fully abrogated, it has been much weakened and modified." The Court says, per ANDREWS, J., at page 482: "When the restraint is general, but at the same time is *co-extensive only with the interest to be protected and with the benefit meant to be conferred*, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. * * * *If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells?*"

On page 483, it is further said, per ANDREWS, J.:

> "It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monop-

olies, which are opposod to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the employment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. *But the business is open to all others*, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. *Such contracts do not create monopolies. They confer no special or exclusive privilege.* If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee.

"We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production and to enhance prices, are or may be unlawful, but they stand on a different footing. We cite some of the cases showing the tendency of recent judicial opinions on the general subject. Whittaker v. Howe, 3 Beav., 383; Jones v. Lees, 1 Hurl. & N., 189; Rousillon v. Rousillon (14 L. R. Ch. Div., 351); Leather Co. v. Lorsont, 9 Eq. Cas. L. R., 345; Collins v. Locke, 4 App. Cas. L. R., 674; Oregon Steam Co. v. Winsor, 20 Wall., 64; Morse v. Morse, 103 Mass., 73. In Whittaker v. Howe, a contract made by a solicitor not to practice as a solicitor 'in any part of Great Britain,' was held valid. In Rousillon v. Rousillon, a general contract not to engage in the sale of champagne

without limit as to space, was enforced as being under the circumstances a reasonable contract. In Jones v. Lees, a covenant by the defendant, a licensee under a patent, that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them was held valid. BRAMWELL, J., said: 'It is objected that the restraint extends to all England, but so does the privilege.' In Oregon Steam Co. v. Winsor, the court enforced a covenant by the defendant, made on the purchase of a steamship, that it should not be run or employed in the freight or passenger business upon any waters in the State of California for the period of ten years.

"In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed, has, to a considerable extent at least, by the change of circumstances, been removed."

On page 484 the Court unequivocally hold that the circumstance that the covenant is a perpetual one does not make it invalid. "*It is practically unlimited as to time, but this under the authorities, is not an objection, if the contract is otherwise good.*"

Since the decision of the Court of Appeals of New York in the *Diamond Match Case* there has been a succession of cases in that Court holding in effect that a covenant unrestricted in time and territory is valid if necessary to the protection of the property rights or good-will sold. This doctrine has been extended and applied to other cases than a sale of a business property with its good-will.

Hodge vs. Sloane, 107 N. Y., 244, was a case involving a restrictive covenant in a deed of land by which the grantee bound himself not to sell any sand off the premises, the object being to protect the grantor from competition in the business of selling building sand from his remaining property.

Leslie vs. Lorillard et al., 110 N. Y., 519, was a case where an agreement was held to be valid between two steamship companies, whereby one of the companies, in consideration of a monthly payment to be made to it, agreed to discontinue running vessels on a particular route, the Court drawing a dis-

tinction between an agreement which merely removes a business rival and an agreement which undertakes to exclude all competition in business.

Tode vs. Gross, 127 N. Y., 480, was a case where the owner of a cheese factory was engaged in manufacturing several varieties of cheese by a secret process and entered into an agreement to sell her factory, together with the good-will, custom, trade-marks and names used in and belonging to said business, and covenanted to communicate the secret of the manufacture to the vendees and to refrain from communicating said secret to anyone else, and after a certain date refrain from making, manufacturing or vending said cheese for five years. The Court, per VANN, J. (p. 485), held :

> " The covenant was not in general restraint of trade, was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agreement is *not opposed to public policy, even if the restriction was unlimited as to both time and territory.*"

Matthews vs. Associated Press of the State of N. Y., 136 N. Y., 333, was a case where a by-law of the defendant corporation was held valid. It prohibits its members from receiving or publishing "the regular news dispatches of any other news association covering a like territory and organized for a like purpose." The Court held that the by-law was not objectionable as tending to restrict trade and competition or to create a monopoly.

Oakes vs. Cattaraugus Water Co., 143 N. Y., 430, was a case which held that where the business of a private corporation or individual is threatened with competition, a contract with a competitor that he shall abandon his enterprise and take employment at an agreed compensation with such corporation or individual is not against public policy.

Wood vs. Whitehead Brothers Co., 165 N. Y., 545, was a case where a person who was engaged in the business of buying and selling a commodity, but with neither a business plant nor stock, entered into a contract with a corporation whereby he agreed for a certain compensation to discontinue his business and to turn over to it all orders which he then had or

might thereafter receive for the commodity in question, and the Court held the agreement to be valid and not an unreasonable restraint of trade. The Court say, at page 551, per GRAY, J. :

> "*But, contracts between parties, which have for their object the removal of a rival and competitor, in a business, are not to be regarded as contracts in restraint of trade. They do not close the field of competition, except to the particular party to be affected.*"

N. Y. Bank Note Co. vs. Hamilton B. N. Co., 180 N. Y., 280, was a case where a corporation engaged in manufacturing presses for printing, numbering and perforating strip tickets entered into a contract with a Printing Company, by which all future sales of the presses should be made to and through the latter Company, which should have the right to lease the presses, the prices to be collected by the Printing Company and paid by it to the Press Company. The latter Company further agreed not to attach the numbering and perforating devices to any press previously manufactured and sold, the object of the contract being to prevent any competitor of the Printing Company from obtaining or using any press built by the Press Company with the numbering and perforating attachments or which could be used for printing strip tickets of form, design or purpose similar to those printed or that might be printed by the Printing Company, and the Court held the contract not to be in restraint of trade, notwithstanding the fact that the contract was restricted to the sale of presses to the Printing Company, and that a separate consideration was paid for the covenant of restriction.

The authorities in the other States of the Union are to the same effect. The law on the subject is fully reviewed in the opinion of the Court in *Anchor Electric Co. vs. Hawkes*, 171 Mass., 101. That case was originally heard before Mr. Justice HOLMES, who granted an injunction and reported the case to the full Court who sustained his decision and granted a decree for plaintiffs. It appeared in that case that there was a written agreement between four corporations, whereby the assets and good-will of three of the corporations were transferred to the fourth, and the three agreed to discontinue business. The Court examined the previous decisions and approved the doctrine laid down in *Diamond Match Co. vs. Roeber*, 106 N. Y.,

473, and *Tode vs. Gross*, 127 N. Y., 480 *supra*, and the cases in other States to the same effect. The Court also approved of the decision of the House of Lords in *Nordenfelt vs. Maxim, etc., Co.*, L. R. (1894), App. Cas., 535, cited *supra*.

In *United Shoe Machinery Co. vs. Kimball*, 193 Mass., 351, the subject is again considered by the Supreme Court of Massachusetts and the authorities reviewed and the rule stated that in certain cases a covenant may be valid "which is unlimited both in time and space." The Court say:

> "The value of a business with its good-will may be enhanced to a purchaser by the fact that its competition is detrimental to a business conducted by him. A considerable part of the price paid may represent the value to the purchaser of relief from the interference of the vendor as a competitor. The mere fact that a contract looks to the withdrawal of the competition of one of the parties to it does not render the contract invalid."

See also

Rakestraw v. Lanier, 104 Ga., 188.
Bullock v. Johnson, 110 Ga., 486.

The most recent decisions in the State Courts in which covenants to refrain from competition have been held reasonable and lawful are:

Freudenthal vs. Espey (Col. Supreme Ct., May 3, 1909), 102 Pac., 280.
Louisville Board of Underwriters vs. Johnson (Ct. of App., Ky., May 14, 1909), 119 S. W., 152.
Wolf vs. Duluth Board of Trade (Supreme Ct., Minn., June 4, 1909), 121 N. W., 395.
Siegel vs. Marcus (Supreme Ct., N. Dak., Jan. 7, 1909), 119 N. W., 358.
Buckhout vs. Witwer (Supreme Ct., Mich., July 6, 1909), 122 N. W., 184.
Bloom vs. Home Ins. Agency (Supreme Ct., Ark., July 12, 1909), 121 S. W., 293.
Wooten vs. Harris (Supreme Ct, N. C., Sept. 21, 1910), 68 S. E., 898.
Home Telephone Co. vs. North Manchester Telephone Co. (Ind. Appellate Ct., Oct. 4, 1910), 92 N. E., 558.
Artistic Porcelain Co. vs. Boch (Ct. of Chancery, N. J., Oct. 22, 1909), 74 Atl., 680.
Harbison-Walker Refractories Co. v. Stanton (Supreme Ct., Pa., Jan. 3, 1910), 75 Atl. 988.

(B.) THE BRITISH-AMERICAN AGREEMENT.

This agreement is Exhibit 2, annexed to the Government's bill of complaint or petition.

This agreement is not in violation of the Anti-Trust Act.

What has been said with regard to the provisions of the American-Imperial Agreement, Exhibit 1, applies to the provisions of the British-American Agreement, Exhibit 2.

Exhibit 1 was an Agreement of sale of the plant and assets and good-will of the business of the Ogden Company to The Imperial Company, excluding, however, the export business of that Company. Exhibit 2 was an Agreement of sale by the American Companies and the Ogden's Limited to another British Company, to be formed under the laws of England, known as the British-American Company, of the export business of these various Companies and of the plants and good-will connected therewith. By the export business was meant the business of exporting tobacco products to countries other than the United States and Great Britain. The sale of this business and of the various plants, manufactories and good-will connected therewith to the British-American Company was also accompanied by similar covenants on the part of the vendor Companies not to compete with the vendee Company. The same arguments which sustain the validity of the covenants in Exhibit 1, likewise sustain the validity of the covenants in Exhibit 2.

Under the principles laid down by the cases and which we have heretofore discussed in connection with Exhibit 1, that is, the agreement for the sale of Ogden's, Limited, by the American Company to the Imperial Company with the accompanying covenants, it is evident that if the British-American Company had been a going concern and if the Imperial Company had sold to the British-American Company its export plants with the right to export from Great Britain to countries other than the United States, with accompanying covenants to protect the vendee from competition, such an agreement would have been perfectly valid even if the Sherman Law applied. So likewise, if the American Company had conveyed to the British-American Company its export plants for the business

of exportation to countries other than Great Britain, with accompanying covenants to protect the vendee from competition, such a transfer would have been valid. What difference does it make in principle that the two companies—the Imperial and the American—simultaneously transferred their respective business of export with accompanying covenants to protect the vendee from competition, and what difference in principle does it make that the vendee company was not, prior to the transfers, a going concern and was formed for the very purpose of taking over these transfers and receiving the covenants? If we assume, in other words, that the Imperial could have transferred all its export business to the American with covenants against competition to protect the American in the purchase, or if we concede that the American could have transferred to the Imperial its export business with like covenants, what difference does it make that instead of transferring directly from one to the other, they both transferred to a third party, namely, a corporation formed for that purpose? There is no greater restraint of trade in the course pursued than there would have been in the alternative plans suggested, nor would there be any greater monopoly.

It is, of course, to be borne in mind in considering the force and effect of the British-American agreement that there is absolutely *nothing in that agreement which prevents or tends to prevent any other company or companies from exporting* manufactured tobacco to other countries than Great Britain and the United States. There is *no agreement to restrict prices* or to *interfere in any way with free competition.* The testimony shows that the number of independent manufacturers in the United States instead of decreasing has increased constantly since these agreements went into effect. What is there to prevent any one of the independent manufacturers from shipping its goods to China or Japan or Australia? There is nothing to prevent any more than there was prior to 1902. The fact, if it be a fact, that by far the greater part of the export business or even the entire export business from the United States to foreign countries to-day is done through the British-American Company

must be owing entirely to the superior trade methods of that Company or its superior facilities for handling and transacting the business in those countries. There is absolutely nothing in the British-American agreement of September, 1902, which tends in any way to hamper or restrict any independent American manufacturer from exporting goods to foreign countries.

Of course, as repeatedly said, the Sherman Act cannot be construed to apply to restraint of trade between Great Britain and foreign countries other than the United States, so that the part of the contract by which the Imperial Company transferred its export business to the British-American can cut no figure in this case. The only possible feature of the British American agreement that can be held to come within the Sherman Act is so far as the agreement may operate to restrain trade between the United States and foreign countries other than Great Britain.

So far as the British-American agreement may have a tendency to raise the price of American manufactured products when exported to foreign countries, we submit that it is no part of the function of our Government to prevent the raising of prices to foreign consumers. Even if, however, we concede that it is within the purview of the Sherman Act properly construed to prevent the raising of prices to foreign consumers, there is absolutely no evidence in this case that such a result has been accomplished, or that prices have in fact been raised, or that the prices now obtained from foreigners for American products are excessive or oppressive. The Sherman Act, as was pointed out by Mr. Justice PECKHAM in the *Joint Traffic* cases (*supra*), is like all other acts of Congress to have a reasonable construction, and while it may be construed especially with regard to railroads, as prohibiting agreements in restraint of trade, whether reasonable or unreasonable, yet even as to railroads it should receive as far as possible a reasonable construction, and when applied to business generally other than the instruments of commerce themselves, it should be construed not only reasonably but with a view to the purposes sought to be accomplished by the act. We submit, that so construed,

the purposes of the act must not be enlarged so as to bring it within the scope and intent of the act to protect the Chinaman and the Japanese from paying an excessive price for American manufactured tobacco and as already said, even if so construed, there is no evidence in this case that the Chinaman or the Japanese is paying an excessive price.

The evidence shows that there was no actual diminution in the business of exporting either leaf tobacco or manufactured tobacco from the United States to foreign countries by reason of the British-American agreement. The British-American Company simply took the place of the American and the Imperial in the business of exporting to foreign countries. The business instead of diminishing actually increased. A larger amount of American leaf tobacco was purchased on behalf of the British-American Company, and a larger amount of leaf tobacco and manufactured tobacco was actually exported after the British-American Company was formed than had been purchased or exported by both of the two Companies prior to the making of the agreement. There was in fact, therefore, no restraint of trade or commerce, nor was there any interference with free competition by other manufacturers or exporters.

The total exportation of American grown tobacco in 1890 was about 1,000,000 pounds. In 1906 the British-American Company exported about 30,000,000 pounds (Testimony of Mr. Harris, Vol. II., p. 66).

The effect of the formation of the British-American Co. has not been to reduce the exportation from this country of leaf tobacco into England in bond, to be manufactured in England and exported to other countries. Simply that instead of being imported into England by the Imperial Tobacco Co. it is now imported by the British-American Co. (pp. 79, 80).

The present exportation of leaf from this country, manufactured or otherwise, by the British-American Co. is very much greater than the aggregate exportation of leaf for use in the export trade by the Imperial and American companies combined before the formation of the British-American (p. 80).

Prior to the agreement Exhibit 2, it had not been the course of business of the Imperial Company to export to foreign countries from the United States manufactured products. As heretofore many times stated in this brief, the Imperial Company at no time carried on the business of manufacturing tobacco products in the United States. All that the Imperial Company had done in the way of exporting had been in exporting leaf tobacco. After the agreements of September 27, 1902, it continued to purchase and export leaf tobacco for its own use for manufacture and sale in Great Britain. It had been accustomed to purchase leaf tobacco and export to Great Britain in bond and manufacture there for export to other countries. It was this business which it gave up under the arrangements entered into by Exhibit 2, and transferred to the British-American Company. That agreement, therefore, did not put an end to any manufacturing industries in this country, nor did it in any way affect the demand for the raw material or the quantity exported.

As already pointed out in our statement of facts and as hereinafter pointed out more specifically, there is no evidence of any lowering of prices to producers of leaf tobacco by reason of the British-American agreement. On the contrary, the uncontradicted evidence shows that prices have risen.

As was said by this Court in *Anderson vs. U. S.*, 171 U. S., 614, of the agreement which was held in that suit not to be a violation of the Sherman law:

"A lessening of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that *trade has greatly increased* since the association was formed, and there is not the slightest evidence that the *market prices* of cattle have been *lowered* by reason of its existence. *There is no feature of monopoly in the entire transaction.*"

(C.) NONE OF THE DECISIONS HERETOFORE MADE BY THIS COURT UNDER THE SHERMAN ACT ARE APPLICABLE TO THE AGREEMENTS HERE INVOLVED.

The *Joint Traffic*, *Trans-Missouri* and *Northern Securities* cases dealt with agreements between Railroad Companies or the holders of railroad stocks, the effect and intent of which were held to be to restrict competition between common carriers and public service corporations. These cases have already been discussed *supra*. They have no application, as we have already argued, to agreements between manufacturers, but are based upon the peculiar obligations of common carriers and public service corporations.

The *Addyston Pipe Case*, 175 U. S., 211, involved an agreement between a number of rival and competing manufacturers to the effect that there should be *no competition* between them in certain States or Territories. It was held that the "*direct, immediate and intended effect*" of the agreement was the "*enhancement*" *of the* "*price.*"

The agreement in effect resulted in fake bids by the rival competitors and in fixing the price at which one of the competitors could obtain the contract desired and below which none of the parties to the agreement was allowed to bid.

This *Addyston* contract was so flagrantly a violation not only of the letter but of the spirit of the Sherman Act that it is difficult to conceive of any combination or conspiracy which could be brought within the Act if that contract were held not to be within it.

In the case at bar, there was no agreement between the American and the Imperial Companies to fix prices, nor was the purpose and effect of the agreements to "enhance" prices to the consumer. There is a total absence of any evidence that prices have been in fact enhanced.

The case of *Montague vs. Lowry*, 193 U. S., 38, was a case where there was a combination of wholesale dealers in tiles, mantels and grates, who conspired to confine the business in California to the members of the combination, by *refusing to sell or deliver* tiles, grates or mantels to any other party in California and who conspired to *raise the prices* of those articles in the California market.

The agreements in the suit at bar contain none of the features condemned by this Court in the *Montague* case. There was no agreement to refuse to sell or deliver to any dealer desiring to purchase and no agreement to raise prices.

The case of *Swift & Co. vs. U. S.*, 196 U. S., 375, involved *combination of independent meat dealers*, who agreed not to *bid against each other* in the live stock markets, to *bid up prices for a few days* in order to induce shipments to the stock-yards, to *fix selling prices* and to that end to *restrict shipments* of meat when necessary, to establish a uniform rule of credit to dealers, *and to keep a black list*, to make *uniform and improper charges for carriage, and to secure less than lawful freight rates to the exclusion of competitors.*

Assuming that that was a case of interstate commerce within the meaning of the Sherman law, as was held by this Court, it would be difficult to conceive of any element of a combination for unlawful restraint of trade or of an attempt to monopolize which was lacking in the *Swift* case.

None of these elements are found in the agreements of the Imperial Company in the case at bar.

The case of *Chattanooga Foundry vs. Atlanta*, 203 U. S., 390, was a sequel of the *Addyston Pipe* case, the action being brought by the City of Atlanta against two of the members of the trust or combination which had been held unlawful in the *Addyston* case. The only questions really discussed by this Court in that case were as to the right of the City to maintain the action and as to the Statute of Limitations of Tennessee.

In the case of *Shawnee Compress Company vs. Anderson*, 209 U. S., 423, an agreement of lease had been held by the Supreme Court of the Territory of Oklahoma to be void as an unreasonable restraint of trade and as against public policy. In that case, however, there were several circumstances differentiating it from the case at bar so far as concerns the Imperial Company's agreements.

In that case the lessor Company had agreed with the lessee Company not only to go out of the field of competition and not to enter that field again, but had further agreed "*to render every assistance to prevent others from entering it.*" There were other facts in the case showing that the lease was

in aid of a scheme of monopoly on the part of the lessee Company, the Gulf Compress Company. It was shown that the lessee Company was in the business of leasing and operating competing compresses for the purpose of monopolizing as far as possible the business of compressing cotton in a large portion, if not all, of the cotton raising districts of the United States, and that the lease was procured from the Shawnee Company in pursuance of said scheme, and other leases of other compressors were also secured for like purposes " and that it is the design of the Gulf Compress Company *to increase the charge of compressing cotton.*" The opinion of this Court delivered by Mr. Justice McKenna, stated at page 430:

> " As our review in the nature of things is confined to determining whether the Court below erred, it follows that our reviewing power under the circumstances is coincident with the authority to review possessed by the Court below, and therefore, *we are confined*, as was the Court below, to *determining* whether there was *some evidence supporting the findings* and whether *the facts found were adequate to sustain the legal conclusions* (Southern Pine Lumber Co. vs. Ward, 208 U. S., 126)."

In the lease the Shawnee Company had agreed not only to refrain from competition, but to "*render the 'Gulf Company' every assistance in discouraging unreasonable and unnecessary competition.*" It further appeared from the evidence that the Gulf Company had announced in a letter to the Shawnee Company in effect its purpose to create as far as possible a monopoly of the compressing business (page 433). It further appeared (page 434) that the "Gulf Company was a close corporation which, starting in Alabama, rapidly extended from Alabama to all the cotton growing territory." This Court said:

> " These are some of the points of the testimony which, *taken in connection with other testimony* and with the terms of the lease and the restriction upon the Shawnee Company, support the conclusions of the Supreme Court of the Territory."

This Court recognized the principle announced in the *Trans-Missouri* and *Joint Traffic* cases " That the sale of the good will of a business with an accompanying agreement not

to engage in a similar business was not a restraint of trade within the meaning of the Sherman Act." This Court said:

> "The principle is well understood. The restraint upon one of the parties must not be greater than protection to the other party requires, and it needs no further explanation than is given in Gibbs vs. Baltimore Gas Co., 130 U. S., 396. The Supreme Court of the Territory recognized the principle, but said: 'Tested by the general principles applicable to contracts of this character, *this agreement is far more extensive* in its outlook and more onerous in its intention *than is necessary to afford a fair protection to the lessee.*'"

It did not clearly appear in that case whether the Supreme Court of the Territory had based its judgment upon the common law, the Sherman law or the statutes of Oklahoma. On this subject this Court said (p. 435):

> "And in this conclusion the *statute of the Territory* may have had its influence. That statute makes void every contract by which any one is restrained from exercising a lawful profession, trade or business, except, however, that one who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business *within the specified county, city or part thereof* (Wilson's Stat., Secs. 819, 820). It is clear that the lease of the Shawnee Company to the Gulf Company does not literally comply with this requirement."

The case of *Continental Wallpaper Co. vs. Voight Sons*, 212 U. S., 227, was a case of an agreement between a number of manufacturers who organized a *selling company* through which their *entire output was sold to such persons only as would enter into a purchasing agreement by which their sales were restricted.* It was held that the clear effect of this arrangement was to restrain and monopolize. The agreement provided for selling to jobbers for the account of the Continental Wallpaper Company *at particular specified prices*, with particular discounts. The Company was a selling company, organized *to control all the selling business* of the manufacturing wallpaper corporations, partnerships and persons who owned the stock of the Continental Wallpaper Company and made separate contracts with that corporation giving it entire

control of the selling business of the manufacturers. The illegality of this arrangement seemed to the Court too clear for discussion, and was not in fact discussed by the Court, the only question discussed and decided being whether a purchaser of goods at the stipulated prices could avoid payment on the ground that the vendor company was an illegal combination.

The foregoing are all of the cases in this Court which have held contracts between manufacturers to be illegal as in violation of the Sherman Act.*

None of the cases we submit apply to the agreements between the American and the Imperial Companies which are involved in this suit. It may properly be said of these agreements, as was said by Judge SANBORN'S opinion as to the contract in *Whitwell v. Continental Tobacco Co.*, Circuit Court of Appeals, 8th Cir., 125 Fed. Rep., 454, concurred in by Judges THAYER and VAN DEVANTER (p. 461):

> "It had no necessary effect to directly and substantially *restrict free competition* in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because *it in no way restricted the exercise of the rights of the competitors* of the Tobacco Company *to fix the prices* of their goods and the terms of their sales of similar products, according to the dictates of their respective wills."

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* The case of *Grenada Lumber Co. v. Mississippi*, 217 U. S., 433, did not arise under the Sherman Act, but under a statute of Mississippi. As this case came to this Court by writ of error to the Supreme Court of the State, the only question which this Court could consider was whether the Statute of Mississippi violated the provisions of the U. S. Constitution. This Court could not and did not review the interpretation placed by the State Court upon the Statute or its decision as to the application of the Statute to the agreement and combination in question (See opinion of Justice LURTON, at p. 440). The agreement and combination was one between a large majority of the independent and competitive merchants engaged in the retail lumber trade in a certain territory, agreeing not to deal with any manufacturer or wholesale dealer who sells directly to consumers in localities where such retail dealers are doing business. This Court did not discuss nor intimate an opinion as to the question whether such an agreement would or would not violate the Sherman law, if it affected interstate commerce, but we can afford to concede for the purposes of argument that it would. The agreements of the Imperial Company in the case at bar have no feature in common with the agreement and combination in the *Grenada Lumber* case.

POINT II.

The oral testimony shows that the agreements did not and could not, under the existing circumstances, operate to restrain trade or create a monopoly, and, therefore, could not and did not operate as a violation of the Sherman Anti-Trust Act, and were not intended so to operate, and were not the result of any conspiracy to violate the Act.

Whatever inference there might be from any of the provisions of the agreements (Exhibits 1 and 2) that there was an intent to violate the Sherman law, is removed by the evidence.

It appears from the testimony that at the time of the Agreements there was *practically no exportation or importation of manufactured product between Great Britain and the United States.* Owing to the protective tariff in this country and the differential imposed upon imported goods in Great Britain, it was impossible to import into this country from England or to export from this country to England any appreciable amount of manufactured tabacco. It was not possible to sell manufactured tobacco imported into this country in competition with the domestic articles of manufacture, nor was it possible to export to England and sell in competition with domestic manufacture. A small amount was exported from each country to the other, which was sold at fancy prices to meet a special demand and to suit the tastes of particular persons.

(See STATEMENT OF FACTS, *supra*, pp. 6, 7).

The situation after the Agreements was precisely the same as before the Agreements so far as concerns any trade between the United States and Great Britain, or between the several States of this country. *The Agreements did not in fact operate to restrain any trade between Great Britain and the United States for the simple reason that there was no trade to restrain.* They did not operate to restrain trade by The Imperial Company in articles manufactured by it in the United States, because it *did not in fact manufacture* any tobacco products *in the United States.*

As already stated, at the time of the American-Imperial Agreement in September, 1902, the Imperial was exporting to this country under certain brands and selling in this country under those brands its tobacco at a high price—a price sufficient to enable it to sell plus the tariff and the internal revenue tax and to make a profit on the goods. The amount thus imported, however, was very small as compared with the total amount in this country and did not in any way affect the price to the consumer of the American tobacco (Rec., Vol. II., p. 411). Since the agreement of 1902 by which the American Tobacco Company acquired the right to manufacture and sell in this country certain brands of the Imperial Company, the American Company has manufactured and used the brands of the Imperial Tobacco Company and has disposed of those brands through the Monopol, which is a trade name for a corporation engaged in distributing tobacco for selling to jobbers and retailers "high grade smokings." Considerable sales of those brands have been made through that Company. Such sales have increased since September, 1902 (See Testimony of Percival S. Hill, Vice-President of the American Tobacco Company, Rec., Vol. II., pp. 410–412). Mr. Hill further testifies:

> "Q. Any decrease by your acquisition of those brands? A. No, sir.
>
> "Q. *And you have not raised prices on those brands to the consumer?* A. *No, sir.*
>
> "Q. The difference has been that the profit on those brands now enures to the American manufacturers and American laborers instead of to British manufacturers and British laborers? A. That is the net result."

So far as it is claimed by the Government that the American-Imperial agreement operated to prevent the Imperial Company from establishing manufacturing in this country and thereby competing with the American Company, the evidence shows, as we have pointed out in our STATEMENT OF FACTS, *supra* (pp. 8 to 10), that the Imperial Company had *no intention of establishing manufacturing in this country* and that the American-Imperial agreement did not in fact prevent and was not intended to prevent the establishing of such manufacturing in this country by the Imperial Company.

So far as concerns trade between this country and foreign countries other than Great Britain, the undisputed evidence shows that that trade has been increased and not diminished since the formation of the British-American Company (See discussion of the evidence under Point I–B., pages 54, 55, as to the British-American agreement, *supra*).

The evidence also shows that there is absolutely nothing to prevent competition with the British-American Company by the independent companies. There is no evidence of any unfair or oppressive acts on the part of the American, the Imperial or the British-American companies to suppress or prevent competition or secure a monopoly in the foreign trade.

POINT III.

So far as the Bill of Complaint herein avers that there was any restraint of competition in the purchase of leaf tobacco, either by reason of the written Agreement (Exhibit 1), or by reason of any other agreement, arrangement or understanding, or any practice outside of the written Agreement, the evidence overwhelmingly disproves any such claim.

(a) Every witness examined in this cause on this subject has testified that there was no agreement, arrangement or understanding between the American Tobacco Company and The Imperial, or its representatives, to refrain from active competition in the purchase of leaf tobacco. The written Agreement has no such provision in it, but on the contrary, expressly reserves to The Imperial Company the right to purchase leaf tobacco in this country. The testimony shows *without any contradiction* that there has been *at all times active competition* between The Imperial Company's agents and the agents of The American Company and of the independent concerns and of the Rigi countries. We are much astonished that counsel for the Government continue to insist upon this claim.

The testimony shows, also, that *the price of leaf tobacco has increased since the Agreement was made and is still increasing.*

It is to be borne in mind in considering this case and the relations of the parties to the purchase of leaf tobacco that The Imperial Company has absolutely no interest whatsoever in the affairs of The American Tobacco Company. It is represented by independent agents in this country. It does not own any shares of stock in The American Company, nor do any of its Directors, except the three who represent the interest of The American Company in The Imperial stock which interest is a minority interest (less than 5%), representing the balance of the stock transferred to The American Company in part purchase of the Ogden's Limited. This does not constitute any community of interest between the two Companies and certainly not any common control. The American Di-

rectors take no active part in the management of The Imperial Company. Only one of them attends the meetings. The American Company has been disposing of its stock in The Imperial Company since it acquired the same and owns to-day less than 5 per cent. of such stock.

(See on this subject the testimony of Mr. Harris, one of the Vice-Presidents of the American Company, Record, Vol. II., pages 56, 57).

At the date of the commencement of this action, Mr. Welford C. Reed, who was made one of the defendants in this action, was the General Manager of the Imperial Company in this country and had charge of their business affairs, including the purchase of leaf tobacco.

Mr. Reed died on the 7th of December, 1907 (Record, Vol. IV., p. 234), before the testimony for the Government was concluded. It was therefore impossible to call him as a witness on behalf of the defendant the Imperial Company. His answer, however, in this cause denies that as a result of the agreements, or otherwise, the purchases made by the Imperial Tobacco Company in this country have been made without competition, and he avers on the contrary " that the purchases on behalf of the Imperial Tobacco Company have always been made in the open market and in competition with the other defendants " (Answer of defendant Reed, fols. 12, 13).

He further denies that " leaf tobacco by agreement is purchased in the various States of the Union on behalf of the British-American Tobacco Company through defendant The American Tobacco Company without competition with any one of the defendants, but this defendant avers on the contrary that the Imperial Tobacco Company has at all times been and is now in active competition with the British-American Tobacco Company and the other co-defendants in the purchase of leaf tobacco in the open market " (Fols. 14, 15).

Further : " This defendant denies that the purchases of leaf tobacco in the United States by the Imperial Tobacco Company are made without genuine competition, or that there has been any destruction of competition by the Imperial Tobacco Company with the other defendant Companies, as a purchaser of leaf tobacco, but this defendant avers that the exact contrary is the fact " (Fol. 20).

After the death of Mr. Reed he was succeeded by Mr. Edgar S. Carlton, as the General Manager in charge of the leaf buying interests of the Imperial Tobacco Company in America (Record, Vol. IV., p. 234). He was called as a witness by the Government and was examined as to the course of business of the Imperial Company in this country. His testimony was as follow s

He has been employed by the Imperial Tobacco Company since July 1, 1902. Prior to that time he was in the tobacco business on his own account, from 1893 to 1902, and prior to that time, from 1889 to 1893, he was in the leaf tobacco business and manufacturing together, for other parties. After he went with the Imperial Company on July 1, 1902, he was supervisor of other buying agents in Virginia and North and South Carolina, travelling from market to market and supervising the purchase of tobacco for the Imperial Tobacco Company (Record, Vol. IV., pp. 229, 230).

The organization utilized by the Imperial Tobacco Company in purchasing leaf tobacco throughout Virginia and North and South Carolina begins with the head office in Richmond from which the General Manager directs the purchases through the various territories by means of traveling supervisors, and through these traveling supervisors to the branch managers of the rehandling plants, who are the buyers on the warehouse floors.

There are nine markets in Virginia, North and South Carolina, where the Imperial Tobacco Company has a head buyer. Under those head buyers there are other men in some of the markets. Danville, Virginia, has three tobacco sales running at the same time and requires three buyers. The Company operates in twenty-four markets. In nine of them it operates through its own buyers, and in the remainder on commission, and there are fifty or sixty small markets on which tobacco is bought and shipped to the various plants and markets to be rehandled (Record, Vol. IV., pp. 230, 231).

When Mr. Carlton went into the employ of the Imperial Company, Mr. McDonald was the head agent and Mr. W. C. Reed was the practical tobacco man. McDonald continued as the head agent for about three years and was then succeeded by Reed.

Witness was supervisor of purchases under Mr. McDonald

and received instructions from him in a general way (Record, Vol. IV., pp. 231, 232). Mr. Reed and Mr. McDonald gave him averages of prices about which they expected him to buy the various grades and he was instructed to buy so much of a particular grade of tobacco, if he could, at a specified price, and he would then go into the market and get it on the best terms he could, round about those prices (pp. 232, 233).

Witness is now in charge as General Manager of all the purchases of the Imperial, not only in Virginia, North and South Carolina, but in Kentucky, Tennessee and Ohio (p. 234).

In the Southwestern portion of Kentucky the Imperial Company buys principally on the Louisville market through a broker. It buys at Owensboro, Henderson and Hopkinsville through salaried buyers. The buyers go through the country and buy directly from the farmers.

The warehouse system which prevails in Virginia has not been adopted to any extent in the West (pp. 234, 235).

Mr. Carlton testified on cross-examination that he never at any time received any instructions from anybody connected with the Imperial Company to refrain from competition with the American Tobacco Company, or any of its allied companies and did not, as a matter of fact, refrain from competition with the American Tobacco Company or any of its allied companies. On the contrary, the American Tobacco Company has been one of his chief competitors straight through. He has been in active competition with the British American Company also. There has been no change in the course of business since he became General Manager.

> "Q. Have you issued any instructions to your subordinates or do you know of any instructions having been issued from any quarter with regard to refraining from competition in the purchase of leaf tobacco?
>
> "A. No, there have been no such instructions issued from my office by myself or anybody else" (Record, Vol. IV., p. 261).

The American Tobacco Company buyers have been in active competition with the Imperial Company in all of the principal markets. The independent buyers representing in-

dependent tobacco houses have been "very strong buyers." There has been more or less speculative buying at different periods. The "Rigi" people (that is, representatives of such foreign Governments as have a Government monopoly of the tobacco business) have had their agents in active competition with the Imperial Company (pp. 261–2).

The method of selling leaf tobacco on the warehouse floor is thus explained by Mr. Carlton at page 263:

> "The farmer hauls the tobacco to the market on wagons or ships it by rail; hauls it to a particular warehouse in Danville or some other market and the tobacco there is taken charge of by the warehouse operator or owner and placed on sale in rows, piles, according to the grades he has made, say each grade of the cured tobacco weighing 700 or 800 pounds, he would probably have seven or eight grades, as first his best leaf, second and third grade leaf, cutters, lugs and common types of tobacco. When the sale hour arrives the auctioneer begins on one pile of tobacco, the buyers assemble around this pile of tobacco and bid according to their requirements; it might happen that I would not be interested in the first pile and would not make a bid on it; it might be that I was interested in the second pile and might have a half a dozen buyers on it; each of us of course *would bid to his extreme limit in order to buy that pile of tobacco* and so on through the farmer's offering. If he is dissatisfied with any one of those piles of tobacco, he has the privilege when his last pile is knocked out, sold, he has the privilege of rejecting the bid made on any one of those lots or all of them, the farmer has, he takes it in, in other words.
>
> "Q. He takes his tobacco back? A. Takes his tobacco back.
>
> "Q. And there is another auction sale held on it? A. He has that privilege; it is not offered again until the farmer designates the time he wants it offered; the next day or perhaps next week or next month.
>
> "Q. So that if the farmer thinks the price offered insufficient, too low, he withdraws his tobacco from

the sale of that day, cancels the sale and sells it over again some other day? A. Yes, he has that privilege.

"Q. Does he have to pay any extra charge for that? A. No.

"Q. And that is the way the market price is fixed, is it? A. Fixed by the auction sale, yes.

"Q. With the right of withdrawal by the farmer if he is dissatisfied? A. If he is dissatisfied.

"Q. What effect does the price realized in any one season have upon the offerings by the farmers in the next season? A. It has a very material effect. If the price running through the crop has been very low naturally he is not encouraged to increase his planting the next year, rather inclined to curtail it.

"Q. And plant some other crop in lieu of tobacco? A. Yes" (Record, Vol. IV., pp. 263, 264).

A certain quantity at least of particular grades of tobacco has to be bought to meet the needs of the Company for the coming season. The buyers do the best they can to get it at the lowest market price. Oftentimes if the grade of tobacco is scarce they have not only to meet the present market but to buy beyond the average market price.

Counsel for the Government in their brief refer to certain letters introduced in evidence, which they claim establish that there was some sort of an understanding between the American Company and the Imperial Company with regard to prices at which leaf tobacco was to be purchased, and that objections were made as to unfair treatment in the matter of raising prices. These letters are fully explained by the testimony, and as so explained they do not in the least degree bear the construction placed upon them by counsel for the Government. It is quite apparent, however, that a warfare carried on by one of these Companies against the other for the mere purpose of cornering the market and preventing the other Company from making the purchases necessary for its business at the fair market prices might legitimately be complained of by the representatives of the Company aggrieved by such conduct. Such complaint would not even tend to prove that there was any understanding or agreement for-

bidding or restricting or interfering with fair competition between the parties. The proof is overwhelming and practically undisputed that there was *at no time any agreement or understanding* between the two companies or their representatives to that effect, and that there was in fact *at all times keen competition* between the Imperial buyers, the American buyers, the independent buyers and the Rigi buyers.

Mr. Carlton's testimony shows, and the tables of prices produced by him demonstrate, that the Imperial Company paid at all times, for the tobacco purchased in the Eastern markets, a higher average price than was paid by all the other buyers. Mr. Carlton did not have personal charge of the Western markets until the middle of 1907, and does not undertake to testify except in a general way as to what was done in those markets, but there is no evidence produced by the Government to show that the Imperial was buying its tobacco in the Western markets at any less rate than the average market price paid by all consumers.

(b) So far is it from being the fact that there has been any injurious result to the farmer through any lack of competition, the fact is that *the amount of consumption of leaf tobacco and the price paid for it have both increased since 1902 up to the present time.*

Mr. Carlton testifies that in the Fall of 1902 there was an excited market. There was abnormal competition—a kind of war between the Imperial Company and the American Tobacco Company and independent tobacco dealers. Tobacco was not bought according to value. There were no real values that year. After that there was a decline in the price of tobacco. The cessation of hostilities or bitter fight between the American and Imperial helped to bring it about. The crop turned out to be 25 or 30 per cent. larger than anybody estimated it to be. That helped to bring it about (p. 265). The 1903 crop acreage was estimated to be practically as large as 1902, but the yield per acre was not quite so large; it yielded about 30,000,000 pounds less tobacco or 250,000,000 pounds that year, which was also a very large crop and way beyond the normal. That crop sold at the low price, because the general tobacco market was unsettled from the previous big crop. Tobacco dealers of all descriptions had large stocks unsold,

tobacco lying on the English and American markets. There was only a year's supply to buy out of the 1903 crop. That together with the general depreciation caused by the unprecedented warfare of the year before made this crop of tobacco start off at a very low price.

The course of prices since 1903 has been "a strong upward tendency" (p. 266).

The general average of all sales in 1902–1903 for the three States of Virginia, North and South Carolina was 9.98. The average price paid by the Imperial Company during that period was 10.41. This was for the period between August 1, 1902, and August 1, 1903 (page 267).

From August 1, 1903, to August 1, 1904, the average price paid by all purchasers was 6.31. The average price paid by the Imperial was 7.19.

The next year, 1904–1905, the average price paid by all purchasers was 8.59. The average price paid by the Imperial was 10.20.

The following year, 1905–1906, the average price paid by all purchasers was 8.64. The average price paid by the Imperial was 8.76

The following year, 1906–1907, the average price paid by all purchasers was 9.43 and the average price paid by the Imperial was 10.48.

The next year, from August 1, 1907, to February 1, 1908, the average price paid by all purchasers was 10.30 and the average price paid by the Imperial was 11.44 (pp. 268, 269).

As to the purchases of Western tobacco, Mr. Carlton could not give the figures representing the average price of sales to all buyers, but did give the figures representing the average price to the Imperial Company.

The figures for the successive years from 1902 to date, with the exception of the year 1903–1904, showed a steady increase, the figures for 1902–1903 being 4.33; 1903–1904, 4.17; 1904–1905, 5.50; 1905–1906, 6.38; 1906–1907, 7.43; 1907–1908, 8.00. (Page 270.)

See to same effect as to the steady increase in price to the the farmer, Exhibit annexed to Government's brief marked Appendix C.

The testimony of substantially all of the officers of the American Company and of its allied companies has been

taken in this suit, either on behalf of the Government or on behalf of the defendants, and they have all testified that there has never been any agreement, arrangement or understanding at any time between the Imperial Company and the American Company, or any other of the defendants, other than the agreements copies of which are annexed to the bill of complaint herein, and particularly that there has never been any agreement, arrangement or understanding with regard to suppressing competition in the purchase of leaf tobacco or fixing prices for the same. They also testified that, as a matter of fact, there has been at all times real, genuine and active competition between the buyers for the Imperial Company and the buyers for the other defendants in the market.

Similar testimony has been given by Mr. Yuille, who has had charge of the purchasing for the American Company in the eastern division of the country, and by Mr. Robert K. Smith, who has had charge of the purchasing for the American Company in the western division of the country.

To recapitulate the testimony on this subject, or to refer to the pages bearing on it would unnecessarily expand the volume of this brief.

(c) The American Company has not purchased any leaf tobacco for the Imperial Company, except a little tobacco of the crop of 1902–3, for which the Ogden Company had given orders to the American Company prior to the contract of September, 1902. Certain outstanding contracts or agreements the Imperial Company, as the purchaser of the Ogden Company, took over and completed. Since that year expired, *no purchases have been made for the Imperial Company by the American Tobacco Company* (Testimony of Carlton, Vol. IV., pp. 274, 275).

In like manner there were some purchases in 1902 and 1903 made in Virginia by the Imperial Company for the branches of the British-American Tobacco Company abroad. Certain orders for the Imperial's export factories in England were supplied through that year after the British-American Company had been formed,—the orders having been given before the formation of that Company.

There were also some small purchases for the British-American Tobacco Company in 1904.

Since 1904 the Imperial has not bought any leaf tobacco for

the American Tobacco Company or for the British-American Tobacco Company (Vol. IV., pp. 275, 276).

Counsel for the Government have scratched with a fine-tooth comb for some shreds of evidence against the Imperial Company.

Purchases of Perique tobacco have been called attention to as having been made for the Imperial Company by the American Company.

This is certainly a case of "*de minimis*" and is only pertinent as illustrating the straits to which counsel for the Government have been driven to find some evidence in support of the charges of their bill.

The facts are that Perique tobacco is a special kind of tobacco grown only in one parish in Louisiana. The requirements of the Imperial Company of this tobacco are so small that it has never really been considered seriously as a part of the tobacco business of that company, only from 20,000 to 30,000 pounds of it being used in a year, amounting to about $6,000 to $8,000 a year. This was purchased through the American Tobacco Company for purposes of convenience, none of the Richmond organization knowing anything about the Perique tobacco or the manipulation or purchase of it. The arrangement for the supply of this tobacco terminated in 1907 (Record, Testimony of Carlton, Vol. IV., pp. 277, 278).

References to *purchases of "Turkish" tobacco* in the brief of counsel for the Government seem to us so clearly irrelevant that we are at a loss to understand why such references are made. Purchases of Turkish tobacco abroad by the American Company are clearly irrelevant to any question of competition in American leaf tobacco in this country.

Such leaf tobacco as the Imperial Company needs for its cigar business is bought by an agent who comes over from England for that purpose. It is a small percentage of their requirements; most of it is bought abroad in foreign markets.

None of it is bought from or through the American Cigar Company (Testimony of Mr. Carlton, Record, Vol. IV., pp. 278, 279).

(d) There being a total failure of proof on the part of the Government to support the charges that there was an absence of real competition between the Imperial Company and the American Company in the purchase of

leaf tobacco and the evidence being overwhelming that there was at all times real, substantial and active competition, the Government in their brief endeavor to make out some kind of a case of collusion between the two Companies by referring to certain letters passing between the American Company and the Imperial Company and between the agent of the Imperial Company in this country and the Imperial Company itself in the years 1902 and 1903. Those letters are fully explained in Mr. Carlton's testimony. As a matter of fact, they show that the two Companies were in actual competition, but were complaining from time to time of *unfair methods of competition*, just as they might complain of unfair competition by any other outside competitor. These letters are all in the early period of the contract relations of the two Companies, 1902 and 1903. After 1903, the condition of active and actual competition between the two Companies seems to have been recognized and acquiesced in by both parties, and as already stated, the testimony shows it to have been an active and genuine competition, with the result that the Imperial Company was paying higher prices for their tobacco than the American, as is shown by Mr. Carlton's figures.

(e) It is not a little remarkable in view of the wholesale charges made by the Government in their bill of complaint, and in their brief as to the suppression of competition in the purchase of leaf tobacco, and in view of the apparently excited state of mind of the producers in certain parts of the country, notably Kentucky, where the "Night Riders" outbreaks occurred during the pendency of this suit, that *not a single farmer or producer was called as a witness* for the Government to establish the proposition that there was any *absence of competition* in the *purchase of leaf tobacco* since the agreements of 1902, or that there had been any shrinkage in the price of leaf tobacco, *or that the producers have any grievance* whatever against either the American Company or the Imperial Company.

The absence of any such evidence in view of the unlimited opportunities that the Government had to obtain the same, if obtainable, is conclusive against the present contention of the Government in this suit that there has been any suppression of competition in the purchase of leaf tobacco.

POINT IV.

No decree can be made in this suit as against the Imperial Company which will be just and equitable.

The Imperial Tobacco Company of Great Britain and Ireland, Limited, has parted with value on the faith of the agreements entered into with The American Tobacco Company in September, 1902, and on the faith of the organization of the British-American Company.

In the first place it purchased the Ogden's Limited outright and took a transfer of the assets of the Ogden's Limited, in consideration for which it paid a large amount in cash and issued a large amount of its own securities to The American Tobacco Company, the owner of the Ogden's Limited. It also transferred to The American Tobacco Company its right to its labels and trade-marks and brands, with the right to use the same in the United States. Its covenants not to engage in business in the United States in manufacturing and selling manufactured articles were merely incidental to the purchase of the Ogden's Limited in England and to the transfer to The American Company of the right to use its labels, brands and trade-marks in the United States.

No decree can be made in this suit which will do justice to the Imperial Company short of returning to The Imperial Company the consideration which it parted with on the faith of the purchase of Ogden's Limited and on the faith of the covenants of The American Company.

So, also, under the British-American agreement (Exhibit 2), the Imperial Company parted to the British-American Company with valuable assets on the faith of the agreement, irrespective of its good-will, labels and trade-marks and other intangible assets. The tangible assets conveyed by the Imperial in the shape of factories, real property, fixtures, machinery and materials amounted to upwards of $3,000,000 in actual value, for which it received that amount in cash (see Testimony of Harris, Vol. IV., pp. 735 to 743).

The sale of these assets by the Imperial to the British-American was accomplished in England, and the purchase

price was paid in England by the British-American Company in cash from funds on deposit to its credit in a bank in London, which funds were derived from the sale of stock of the British-American Company to the Imperial Company and the American Company pursuant to the agreement.

No decree can or should be made restraining the American Company from carrying out its covenants with the British-American Company since those covenants were part of the consideration on the faith of which the British-American Company purchased the export business and the good-will connected therewith of Ogden's Limited and the American Company and its allied companies, and were also part of the consideration moving to the Imperial Company, and inducing it to part with its export business and good-will to the British-American Company.

It is manifest that *short of a decree undoing all that has been done* and setting aside the contract *in toto gross hardship would result to the Imperial Company* and it is manifest that *no decree undoing all the transactions can be made in this suit which would be effective in England or binding upon the Imperial Company or the British-American Company in that country.*

If it be suggested that the Imperial Company can be enjoined from carrying on business in this country at all until it shall comply with any decree that may be made by this Court the answer to that proposition is that *such a decree would operate to the injury of American trade,* and would be *a greater restraint upon trade and commerce between this country and foreign nations* than the agreements complained of could possibly be.

What the practical result would be of a cessation of *purchases of leaf tobacco,* which is *the only business carried on in this country by the Imperial Company,* upon the interests of the farmers can only be conjectured. To enjoin one of the largest consumers of leaf tobacco from purchasing would certainly not tend to enhance the price of the raw material in the hands of the farmers and would certainly not be in the interest of the American producers.

Nothing short of a dissolution of the British-American Company and the winding up of its affairs and the re-conveyance of its assets, would accomplish substantial justice as between that

Company and its two principal stockholders, the American Company and the Imperial Company. This is impracticable since the Courts of Great Britain alone can adequately administer the affairs of the British-American Company.

Indeed, it is *difficult to conceive of any relief* which can be granted *in this suit which would not produce inextricable confusion and injustice* and we submit that *no relief can or should be granted against this defendant.* This suit is brought in equity and should be decided upon principles of equity. Whether or not equity is the proper *forum* in which to enforce a penal Statute is a question which we have not thought it necessary or proper to discuss. The Statute so provides and we submit to the jurisdiction of this Court as a Court of Equity. It cannot be, however, that when Congress has authorized a Court of Equity to enjoin the performance of an agreement claimed to be in violation of a statute, it authorizes the court to proceed without regard to consequences, and without regard to the ordinary principles applicable in a Court of Equity. The Court will not " run amuck " and make a decree which shall play havoc with vested interests and *will not make any decree whatever unless it can find a method of doing justice and equity without accomplishing wanton injury.*

POINT V.

Neither Exhibit 1 nor Exhibit 2 violates the spirit of the statute by raising the price to consumers, lowering the price to producers or preventing competition.

There are three possible evils aimed at by the Sherman Anti-Trust Act: First, the *raising of the price of a commodity to consumers;* second, the *lowering of the price of raw material to producers;* third, the *crushing out of competitors.*

We have assumed for the purposes of this case, that the lowering of the price to producers is one of the evils against which the Sherman act is aimed, although were it necessary to do so, we might very well dispute this proposition and might successfully contend that raising the price to the consumer is the evil aimed at.

There is no evidence in the case at bar that the agreements between the Imperial Company and the American Company which are attacked in this suit have resulted in any one of these three evils.

1. There is *no evidence that the price* of tobacco products in any of their forms *has been raised to the consumer.* So far as appears the price has remained the same.

2. There is *no evidence that the price to the producers* of leaf tobacco *has been reduced;* on the contrary, the evidence is uncontradicted that the price has steadily increased.

3. There is *no evidence that any competitor* has been in any way *interfered with* by reason of the agreements between the Imperial Company and the American Company. Every manufacturer in the United States has been at liberty to manufacture and export his goods without any hindrance on the part of either the Imperial or the American or the British-American or any of the other defendants in this case.

It is to be noted that the agreements in this suit do not undertake to fix prices or to pool profits or to eliminate competition in any way or to interfere with the ordinary laws of supply and demand.

The decree of the United States Circuit Court for the Southern District of New York dismissing the bill as to the Imperial Tobacco Company of Great Britain and Ireland (Limited) and as to the British-American Tobacco Company should be affirmed.

WM. B. HORNBLOWER,
JOHN PICKRELL,
WILLIAM W. MILLER,
MORGAN M. MANN,
Of Counsel for Appellee, The Imperial Tobacco Co.

Office Supreme Court U. S.
FILED
JAN 5 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

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118 (FORMERLY 316).

THE UNITED STATES OF AMERICA

against

THE AMERICAN TOBACCO COMPANY AND OTHERS.

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119 (FORMERLY 317).

THE AMERICAN TOBACCO COMPANY AND OTHERS

against

THE UNITED STATES OF AMERICA.

CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF OF THE AMERICAN TOBACCO COMPANY, AND CERTAIN OTHER DEFENDANTS-APPELLEES IN THE FIRST OF SAID APPEALS AND APPELLANTS IN THE SECOND.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES OF AMERICA AGAINST THE AMERICAN TOBACCO CO. and others.	118 (formerly 316).
THE AMERICAN TOBACCO CO. and others AGAINST THE UNITED STATES OF AMERICA.	119 (formerly 317).

Supplemental Brief of The American Tobacco Company, and Certain Other Defendants-Appellees in the First of Said Appeals and Appellants in the Second.

At the argument of this case in January, 1910, there was filed with the Court a voluminous brief and argument, on the facts and the law, on behalf of The American Tobacco Company, and certain other defendants (all of the defendants, except The Imperial Tobacco Company, Limited, United Cigar Stores Company and R. P. Richardson, Jr., & Company, Inc.). Immediately after that argument

there was filed a reply brief, hurriedly prepared, and intended to reply particularly to the arguments advanced by the Government either orally or in its brief and argument. It is not doubted that the Court will give reconsideration to those briefs and arguments, and this supplemental brief is intended to embrace only the result of the thought and investigation that counsel have given the questions involved since the argument in January, 1910, in so far as that thought and investigation is not already set forth in the briefs and arguments already filed. An earnest effort will be made to avoid repetition, whether of language or substance.

I.

Further on Matter of Monopolizing or Attempting to Monoplize.

There are particulars in respect to which, as it seems to us, some current thought, including thought of counsel for the Government, about monopolizing is inexact and confused: *First*, there is a failure to distinguish, by any clear line of cleavage, or indeed any line of cleavage at all, between large businesses on the one hand, and monopolies, on the other. *Second*, the question of *power*, and what is the nature of the power that characterizes unlawful monopolies, as distinguished from the power that is inherent in great individual or corporate wealth, brings confusion worse confounded.

First: It was said by Mr. Justice McKenna in the oral argument of this case that the idea of monopoly as "substantial unity of action in a large

part of a business," advanced by him in the *National Cotton Oil* case, was taken by him from Professor Richard A. Ely of the University of Wisconsin. But Professor Ely draws as clearly as any economic writer the distinction, which counsel for the Government obliterate or confuse, between large or concentrated production, with all its economies and other public benefits, and monopolizing, with its very real public injury. "Unity of action" is the keyword of Professor Ely's definition of monopolizing, it is true, but it is *enforced* unity of action —it is the unity that *excludes* from acting those not absorbed in the unity itself.

A casual reading of Professor Ely's book on "Monopolies and Trusts," published by the MacMillan Company in 1906, enables one to multiply quotations that show his realization that the unification of however so many theretofore separate and conflicting, competing factors in trade, is not monopolizing—provided, always, that there is not, from the nature of the business, or the activities of the unit, an exclusion of others:

> "*Exclusive* unity in business is what monopoly signifies. The business is unified *and others are kept out of it*, except those who act with the combination, if it is a combination." [1]

> "But several things to which attention has already been called must be considered before we take up one main question regarding the self annihilation of competition. *One is that business on a large scale, or concentration of business, and monopoly are two different things. Monopoly means something more than business on a large scale.*" [2]

> "*Just as sharply must we distinguish between competitive businesses of large magnitude and monopolies.* Department stores

[1] Prof. Ely's "Monopolies and Trusts," p. 21. (Italics ours.)

[2] *Ibid.*, pp. 143-144. (Italics ours.)

> in no city in the world enjoy monopolies, but are subjected to the steady permanent pressure of competition. *There are those who call every business operating on a vast scale monopoly,* and would put in the same economic category a gasworks without a competitor and a huge retail dry-goods establishment *with rivals at every hand, ready to seize every opportunity for an advantage over it and certain to ruin it if its managers relax their intense activity and watchfulness. This implies a confusion of thought which must be removed before popular discussions of monopolies can become fruitful.* It may or may not be true that a mammoth department store is a serious evil; with that we are not now concerned; we wish to make clear that it is not a monopoly, precisely *because competition and monopoly are opposites.*"[1]

Just as Professor Ely is clear in distinguishing between large businesses and monopolies, so other writers on economic affairs set an example in this respect that lawyers ought to follow. One of the most interesting and suggestive books on the general subject—devoted though it is to an advocacy of new laws rather than an exposition of present statutes—is "The Control of Trusts," by Professor John B. Clark of Columbia University. He is eloquent in his denunciation of monopolizing—the exclusion by unfair methods of others from the business—and equally eloquent in his defense of the advantages—the necessity, indeed, if America is to cut a respectable figure in the world's trade—of businesses conducted on a vast scale.

"There are three things, not at all identical," Professor Clark says,[2] "which the people, in their "thought and speech, jumble together, and even at- "tack without any discrimination. They are, first,

[1] Prof. Ely's "Monopolies and Trusts," p. 34. (Italics ours.)
[2] Clark's Control of Trusts, p. 6.

"capital as such; secondly, centralization; and "thirdly, monopoly." The confusion in the public mind which Professor Clark thus reprobates is altogether illustrated in the attitude of Government counsel; they not only confuse effective and economical centralization of production with monopolizing, but, as will be more fully argued under the next heading, they have confused the power that is inherent in all wealth with the power that monopolies exercise and so "jumble together" simple capital and its use, and monopolizing.

It is not unlikely that President Taft got from this book of Professor Clark some suggestion for his Columbus, Ohio, speech, quoted in our main brief. President Taft mentioned in that speech two examples of the coercion or oppression that ought to be forbidden by law, and without which, or something similar to which, no aggregation of business or capital ought to be said to be attempting to monopolize trade, however so large it may be; these two examples are two of the four given by Professor Clark, to wit: *First*, selling goods below cost in one locality to crush a competitor, with the purpose and power to recoup the loss by charging high prices in other localities; *second*, the so-called factors' agreement whereby a merchant or consumer must agree to refrain from trading with a competitor in order to deal at all with the offending party. Professor Clark mentions two other means of monopolizing, to-wit: *third*, securing preferential railway rates over one's competitors; *fourth*, selling some special articles that are also sold by a competitor below cost with the purpose and power to recoup the loss by charging high prices for the articles of the same general class sold by the offending party, but not sold by the competitor.

Professor Clark believes that the preferential rail-

way rate has been forbidden by law, and that the other evils have not been, but he believes and argues that with these other three evils stopped, all danger of monopolizing would cease.[1] He believes that the enactment and enforcement of laws to effectually prevent these four things would remove all industrial danger, and, that with only these things forbidden—and then, with encouragement and not discouragement to centralization and its economies and efficiency—with sanity and patriotism and not envy and politics in our attitude to business—with clearness and not confusion in our vision—there should be only optimism, and is not room for pessimism in our business outlook:

> "Well in sight is the policy of the future in relation to trusts. It is one which welcomes centralization, but represses monopoly. It allows mills and shops to grow large and to combine with each other, for the sake of economy which this growth insures; but it puts a stop on predatory uses of the power that is thus gained. It yields nothing to monopoly, but employs the statute-making power to strengthen in every way the condemnation that the common law pronounces on it. Its purpose is to blend efficiency in production with equity in distribution, insuring to the country that shall succeed in carrying out the policy a wealth-creating power which will tell greatly in international rivalries and will be gained without sacrificing the rights of any class of its citizens."[2]

It is interesting to compare the defendants herein with the ideal of so thoughtful an economist as Professor Clark. These defendants undoubtedly have grown large, and have accomplished the economies and efficiencies that growth ought to in-

[1] Clark's Control of Trusts, pp. 60-65.

[2] *Ibid.*, p. 81.

sure; they have shown a wealth-creating power that has told greatly in international rivalries, and by their capital and energy have carried American products where they were never known before. So far as preferential railway rates are concerned, there is no suggestion in pleadings or proof that defendants have profited by them; with the unlimited opportunities for proof of such if such existed—and with the zeal and anxiety of the Government for such proof, as sufficiently noted in the main brief—there is not, indeed, a paucity of proof but an absolute absence of proof of a single competitor injured by the sale of goods by defendants at a price below cost in one section, with the purpose on the part of defendants to recoup these losses by high prices in other sections, as there is also no proof that defendants have sold some of their products below cost, for the purpose or with the effect of crushing a competitor, trusting to abnormal profits on other lines of production; there is proof of the operation by some of the defendants of a form of the so-called factors' agreement which induced jobbers to refrain from handling competitors' products—the New England plan which was in operation in New England and Philadelphia for a few months in 1904; but there is also distinct proof that that plan was tried, not on the initiative of defendants, but at the suggestion of the jobbers; that it was commercially an absolute failure, was definitely and finally abandoned in November, 1904, about three years before the institution of this suit, and that neither that plan nor any like it was ever operated by defendants or any of them before or after the year 1904.[1]

Considering the poverty of proof by the Government of improper or oppressive competition

[1]Main Brief of these defendants, pp. 128-130; Reply Brief, pp. 23-25.

practiced by the defendants; considering the op portunities and facilities of the Government for such proof if it existed; considering the testimony to the fairness of defendants' competition from their own competitors; considering the actual competition which has been created and grown and prospered in the face of the activities of these defendants, as shown by the Record in this case—considering this whole Record as fairly read by fair men—these defendants have no apologies to make for their existence or activities. They meet the requirements of thoughtful economists; they conform to the laws as written and administered by courts, and they conform also to the laws that intelligent economists and publicists believe should be written.

For two things should be remembered with respect to Professor Clark's ideal: *First,* he does not contend that the sale of goods below cost to crush a competitor, or the so-called factors' agreement, is contrary to the Sherman Law, or any other law—he only contends that such practices are against economic propriety and should, if possible, be forbidden by statute; *Second,* he does not suggest that the man or corporation which, even after the enactment of a law forbidding them, resorts to such practices, should be forbidden to exist—their stockholders deprived of all their property; their bondholders deprived of all security for their debts; the public deprived of all the benefits of the economies and efficiencies of such offenders—he merely urges that such practices be effectually stopped. He recognizes that monopolizing is an activity, and not a *status,* and that even for the offense, if and after it is made an offense, the proper remedy is to stop and punish the offense and not to stop all activities—good as well as bad—of the offender.

Second: Another particular in which there is confusion of thought with respect to monopolizing, is in the indiscriminating use of the word "power." In some judicial utterances, as well as in books written by economic and social writers, monopoly has been condemned when it existed, and even before it had yet been abused, because of the *power* that thus existed for the exploitation and oppression of the public. Taking hold of these expressions of condemnation, the Government, in effect, argues in this case: "Let us admit that these de-"fendants have not excluded or attempted to ex-"clude others from the field of manufacturing and "selling tobacco and its products; admit that their "conduct has been as moderate and praiseworthy "as they claim, or as the Court below found it to "have been; admit that their business methods have "been as fair as they must have been when their "leading competitors appear as witnesses in their "favor and not against them; admit all this, and "still they are to be condemned as criminals and "forbidden longer to pursue business activities— "because they have succeeded and are succeeding; "because they have tremendous resources and cap-"ital compared with their competitors, and have "the *power* to crush these competitors by the use "of that capital and those resources."

Is this a valid and sound argument? Is this the *power* whose very existence, when unexercised, is condemned as criminal by the Sherman Law? If so, the rich man may only at his peril enter into trade and commerce. The tobacco business—as argued in our main brief and reply brief—is less than most other businesses capable of being monopolized by the large and wasteful expenditure of money, but even in it, undeniably, abundant capital has real advantages, and a very rich man or corporation by the malignant and wasteful expenditure

of large capital, in an attempt to corner the raw material, or in giving away to consumers manufactured goods, or in other conceivable ways—might injure or, perhaps, bankrupt small competitors. Large capital has no more power in the tobacco business than in any other business, and large corporate capital has not even so much power as the large capital of a natural person. The argument of the Government, then, is against so-called "swollen fortunes;" it is against the employment in any business of large capital, or the entry into any business of a man or corporation of large means.

If Congress could forbid any man worth more than a given amount engaging in interstate commerce; if Congress could forbid a corporation, with a larger capital stock than a fixed maximum, engaging in trade between the States, Congress has not done so. Not only has Congress not attempted to limit the wealth of those engaged in interstate trade, but there is no tendency on the part of the States in that direction. No State limits the wealth of individuals engaged in trade in its borders—as likely no State could do without violation of the Federal Constitution. With respect to the formation of corporations, though, the power of the States is without Federal limitation, and only four States fix a maximum limit of capital stock for manufacturing corporations formed under its laws.[1] Every other than these four States, including some whose anti-trust laws are most drastic, permit the incorporation of companies of unlimited millions with all the power that that wealth gives.

[1]Missiouri, $50,000,000; Michigan, $25,000,000; New Hampshire, $5,000,000; Vermont, $1,000,000.

It would be perhaps going too far afield in this discussion, which after all has to do only with statutory construction and constitutional power, to argue at length, by analogy, the vice of the Government's contention that mere power to monopolize shall be deemed and punished just as the act of monopolizing. All power to do good involves also the power to do evil. Whether the strength of a man—his power—be physical, intellectual or of personal force, it may be turned awry, and turned awry, its potency for wrong is exactly proportionate to its potency for right when turned in the right way. It is so not only with man, but it is so with the servants of man—fire, water, wind and electricity bring life and comfort, but they bring also disaster and death. It is so also with wealth—without it there is no progress, but with it there may be wrong-doing and oppression. It is not the duty of the scientist to see that fire, water, wind and electricity are abolished, but to see that they do not go into the way of disaster and death. It is not the duty of the legislature—much less of the executive department of the Government—to attempt to abolish, or punish, the mere possession of physical or mental strength, or the strength of wealth—let the Government clearly point out the wrong-doing and oppression and ask the courts to stop that wrong-doing and oppression—leaving the power a power for prosperity and well-being.

What is the *power* that courts and economists have condemned as an incident of monopolies, if it is not in its last analysis the simple and inherent power of accumulated capital? *It is the power to exploit and oppress the public, that belongs to him who has excluded others from the trade, or for*

whose benefit others have been excluded from the trade, and who may treat the consuming public as he likes, without fear to him, and without hope to the public, of competition—actual or potential. In the days of Queen Elizabeth, court favorites were given this power by royal decree which in terms restrained all other subjects of the crown from competing with the favored ones, and there was public indignation that approached revolution. So, also, the man, or combination of men, who by wrong-doing excludes others from trade, not only violates the rights of those others, but commits, as well, the public wrong of monopolizing—others being by such wrong-doing excluded as actual or potential competitors, the public is left to the power and mercy of the monopolist.

The difference between this power and the mere power to break a law is clear and infinite. The fact that the possession of large wealth—or a large proportion of any given business—brings the power and temptation to violate the law against monopolizing, may sometime, hereafter, be an argument to the legislator who—unwisely, as we think—may favor a law to limit the wealth of an individual, or the capital of a corporation engaged in trade. In the same way, the fact that carrying deadly weapons gives the power and sometimes brings the temptation to commit murder, undoubtedly has been an inducement to many legislators to enact statutes forbidding the carrying of deadly weapons. Before the passage of such statutes, though, one would not be taken as serious who contended that because the possesion of a deadly weapon gave the power to commit murder such possession constituted itself the crime of murder, or any other crime.

II.

On the matter of intention, or purpose, in acquisition of property.

In the oral argument of the Attorney-General made in this case in January, 1910, he stated that if one person bought the businesses of two competing grocers, theretofore engaged in interstate trade, and thus ended the competition that had theretofore existed between them, such person violated the Sherman Law. When the Attorney-General revised his argument to be filed in print with the Court, he did not recede from the position, but modified it by a note as follows[1] "This proposition is stated too "broadly. It is accurate if the facts of the given "case show that the transaction is *intended* to re- "strain commerce, or that such would be its *neces- "sary* effect."

We are not here concerned with so much of the note as introduces the idea of the "necessary effect" of a transaction; and we are glad of the discussion of the Attorney-General on one account: It eliminates, correctly, as we conceive, the element of *bigness* as a matter of importance, at least so far as the first section of the Sherman Law is concerned. Frankly, we cannot conceive the purpose of the note made, so far as it introduces the element of "necessary effect;" the oral discussion had already brought out exactly the question whether the elimination of competition by the purchase by one competitor of another, or the purchase of two competitors by a third person, did have the "necessary effect" of restraining commerce under the law. With all respect, it seems to us begging the question, to answer that a given transaction—all the essential

[1]Oral Argument of Attorney-General, p. 26. (Italics his.)

factors of which are stated—will violate the law which forbids the restraint of commerce, *if* its necessary effect is to restrain commerce! There are undoubtedly questions of *directness* of effect; constitutional authority of Congress, etc., but surely there ought not to be left as an uncertain element in the theory of the Government the matter of what is "necessary effect."

We are particularly concerned here with the introduction by the Attorney-General into this matter —the purchase of property—of the question of *intention.* We are not dealing now with "attempts" to monopolize—there can be no *attempt* without an antecedent intent—but even here it is the *attempt,* not the *intent,* that is punishable;[1] nor are we dealing with a long course of *conduct,* tied together by a dominating intent as by a thread, such as is common in statutory or common-law actions or indictments for conspiracy, and such as was discussed by Mr. Justice Holmes in the *Swift* case (the *Swift* case involved no discussion of acquisitions); nor yet are we dealing with the possibility of an evil intent to monopolize trade—to exclude from trade the smaller corporation in which the larger held stock—such as Mr. Justice Lurton discussed as Circuit Judge in the *Bigelow* v. *Calumet Co.* case (and he held that the holding of a majority of the stock in a smaller concern by a larger competing concern raised no presumption of such intent). We are considering the simple case of the purchase by one person, and the consequent necessary elimination of competition between them, of two manufacturing businesses theretofore owned by separate owners and whose products were sold in competition in interstate trade. If this transaction is a "contract, combination or conspiracy in restraint

[1]Chief Justice Marshall in U. S. *v.* Riddle, 5 Cranch, 311, 317

of interstate trade," it is violative of the Sherman Law, whatever the intent of the actors; if it is not such, it is not violative of the Sherman Law, whatsoever conceivable intent the actors had.

Purpose and intention have no other or different place and significance in the interpretation and application of this statute than they have in that of any other statute which, like this, does not make a specific intent or purpose an essential element of the offense; that place and significance was stated for this Court by Mr. Justice Holmes in *Ellis* vs. *United States*,[1] when he said:

> "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under these circumstances, he intentionally breaks the law in the only way in which the law ever considers intent."

Restraint of trade is a practical result, not a mental attitude—an actual, direct and immediate effect on trade which, in the very nature of things, purpose or intention, cannot, of their own weight, accomplish or assist in accomplishing.

It is reasoning in a circle to say that acquisitions, otherwise legal, become violations of the Sherman Act when made with intent to restrain trade, and then find this intent in the acquisitions themselves. Under such a method no man may hope to escape condemnation. It is illogical, unnatural and unprecedented. The nature and effect of the thing done is always the paramount consideration.

Said the Court in *Baris* vs. *United States*:[2]

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[1]206 U. S., 245, 257.

[2]160 U. S., 469, 484; see also U. S. *v.* Simmons, 96 U. S., 360, 365.

> "As a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So to constitute a crime against human laws, there must be, first a vicious will, and secondly, an unlawful act consequent upon such vicious will. 4 Bl. Com. 21."

In the *Addyston Pipe & Steel Company* Case,[1] this Court said:

> "If the necessary, direct and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is immaterial whether the design to so regulate commerce was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and that regulation existing, it is unimportant that it was not designed. Where the contract affects interstate commerce only incidental and indirectly, the fact that it was not designed or intended to affect such commerce is simply *an additional reason* for holding the contract valid and not touched by the act of Congress."

Mr. Justice Day (when Circuit Judge) said for the Circuit Court of Appeals of the Sixth Circuit composed, as well, of Mr. Justice Lurton (when Circuit Judge) and Severens, Circuit Judge, in the *Chesapeake & Ohio Fuel Company* Case:[2]

> *"It is to be remembered in this connection that it is the effect of the contract upon interstate commerce, not the intention of the parties in entering into it, which determines*

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[1] 175 U. S., 211, 234.
[2] 115 Fed., 610, 623.

whether it falls within the prohibition of the statute."

We conceive, therefore, that *the true rule with respect to purpose or intent in this regard* is that stated by Mr. Justice Jackson (when Circuit Judge) *in re Greene*,[1] when he said:

> "It is equally clear that Congress has no jurisdiction over and cannot make criminal the aims, purposes and intentions of persons in the acquisition and control of property which the States of their residence or creation sanction and permit,"

a view almost literally adopted by this Court in the *Knight* Case[2] when it said that Congress had not by this statute attempted

> "to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control or disposition of property * * * or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted."

It is barely conceivable that the Attorney-General, in the discussion referred to, had in mind a matter of *principal motive*, and that he would say that if the elimination of competition is the principal motive in making a purchase, it is then to be taken that there was an intent to restrain trade, and the transaction is unlawful under the Sherman Law. We hesitate to so read his discussion, lest we subject ourselves to the criticism justly visited upon those who erect men of straw for the pleasure of bowling them over. How is any Court to meas-

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[1] 52 Fed., 104, 112:
[2] 156 U. S., 1, 16.

ure the relative strength of various concurrent motives—and by its yardstick condemn some purchasers as criminals, and commend others as progressive business men? If A. is a merchant and his neighboring merchant has a good stand, a good trade, a good organization, and a good-will—but is also worrying A. by a vigorous cut-price competition—and, under these circumstances, A. purchases his neighbor's business, who is to say whether A.'s *principal motive* is to get valuable property acquired by him, or to get rid of a troublesome competitor?

Again, there is nothing unlawful in buying a competitor to get rid of competition. "The plaintiff "had a perfect right to buy off the competition of a "powerful, dangerous and aggressive rival. The "law of self-defense and protection applies to one's "business as well as to his person."[1]

Finally, this record presents no cases in which elimination of the competition of the vendor was the *principal motive* in making the purchase. This has been sufficiently discussed heretofore,[2] and we need not repeat it here. The Government has never laid its finger yet on an instance that contradicts the officers of these defendants that each acquisition made by them was to obtain a property worth itself the purchase-price, without reference to the effect of such purchase on the other business of the vendee by the elimination of competition, or otherwise; and that, upon this basis, very few indeed have been disappointing.

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[1]U. S. Chemical Co. *v.* Provident Co., 64 Fed., 946, 950. See also Cincinnati Co. *v.* Bay, 200 U. S., 179, and other cases cited. [2] Main Brief, p. 226. (2) Main Brief, pp. 55, 214.

III.

Monopolizing by Acquisition—Is It or Not Violative of the Sherman Anti-trust Law.

During the course of every general discussion involving the second section of the Sherman Anti-trust Law—the section which forbids monopolizing or attempting to monopolize trade—there arises in the mind of the thoughtful listener a question, which is generally propounded, so far as our observation goes, in one or the other of these forms: Would an individual or combination of individuals who bought up all of the mines that produce anthracite coal violate the second section of the Sherman Anti-trust Law? Would a man or combination of men who bought up all the supply of wheat within the country at a given time violate the second section of the Sherman Anti-trust Law? The question is a serious one and deserves serious consideration, although its categorical answer is, as we conceive, altogether an academic matter so far as this case is concerned.

Undoubtedly, according to our conception, any man or combination of men who sets out to prevent others engaging in trade in a given product by acquisition of the total available supply of such product, or by the acquisition of all the raw material out of which such product can be made, violates the policy of all Anti-trust Laws. This is so, not because such man or combination does all the trade in the product at a given time, but because there has arisen the accomplished or attempted exclusion of others which is the gist of monopolizing. There is a difference, of course, between authracite coal, the supply of which has been definitely fixed by nature, and wheat, the supply of which is

annually renewed—but this, after all, is a difference in the degree of monopolizing possible, and does not affect the principle involved. There is an additional thing to be said with reference to coal and wheat that cannot be said of the commodity involved in the present case—tobacco and its products—to-wit: that coal and wheat are necessaries of life and that the policy of the law with respect to necessaries of life has always been recognized as different from the policy of the law with respect to non-necessaries. We do not intend to linger on this distinction because, as we have indicated, we believe the whole question is in this case academic. It is conceivable, though, that the constitutional right of Congress to interfere with the ordinary transactions of life—purchase, sale, use and enjoyment of property—is greater with respect to necessaries of life than it is with respect to non-necessaries, just as it is greater with respect to property devoted to, or persons engaged in, *quasi* public service than it is with respect to persons and property embarked only in a private enterprise.

Leaving aside these considerations, though, we should say that the evil done by a man or a combination of men, whether that combination be a corporation or not, which attempts to exclude all competition by the acquisition of the total supply of a commodity, or the total supply of the raw material out of which such commodity is made, is exactly within the policy of all Anti-trust Laws. Statutes of England, so early that they became a part of the common law, forbade the engrossing of a product—at least of a product that is a necessary for life. It is ordinarily said that the statutes against engrossing were repealed, along with the statutes against regrating and forestalling, and it is true that all of these particular and definite statutes, the effect of which was to prevent anything but the most

primitive trading, have been repealed. "These "rules were made for the purpose of securing sup- "ply in times when stores were small and transit "difficult and famine near if supply was delayed. "Now, their utility and therewith their operation "has nearly ceased under altered circumstances "from the advance of civilization, it being found "that supply is best secured by leaving mercantile "speculation free."[1] It is nevertheless true that the common law,—recognizing the difficulty, not to say impossibility of such,—does forbid, and has for hundreds of years forbidden the effective engrossing —the cornering—at least of the necessaries of life.[2] So far as the policy of the Sherman Anti-trust Law is concerned, then, we answer the question with which this discussion began in the affirmative and have always done so; in our main brief the cornering of the raw material was referred to specifically as one of the four conceivable ways that the tobacco business could be monopolized; the cornering of the raw material or the commodity to be dealt in constitutes the exclusion of others from the trade by means criminal or tortious at common law.

But there are serious questions still to be resolved before it can be said that the acquisition of all the anthracite coal, or the acquisition of the total supply of wheat, is not only contrary to the policy of the Sherman Law, but in violation of the Sherman Law itself. These questions arise out of the limitations of the powers of Congress, with reference to which Congress must be presumed to have passed the Sherman Anti-trust Law, and are twofold in their nature: In the first place, ours is a dual government, and many highly desirable policies, well within the spirit of repeated congressional enactments, can be effectuated only by the

[1]Sir Wm. Erle on "Law Relating to Trade Unions," pp. 8-9.

[2]Stimson, Pop. Law Making, pp. 53, 61.

legislation of the several States. In the second place, and without reference to the difference between the fields of Federal and of State control, this government is based upon the ideal of individualism, and not upon the theory of socialism or paternalism. The makers of the Constitution did not fail to recognize the possible evils of individual wealth, but they concluded that these evils had better be borne in order that there might be the greatest individual freedom, rather than that they be cured at the expense of having a government which might become a tyrant. When they came to create their National Government they expressly provided that it should have only delegated powers, and in the exercise of even these it should deprive no citizen of the right to life, liberty *or property*. The only delegated authority under which the Federal Government could prevent the acquisition and the ownership of the anthracite coal fields in Pennsylvania, or the wheat in the elevators of Chicago and the Northwest, is the right delegated to it to "*regulate* interstate commerce." It was never intended by such delegation that there should be the power to deprive men or corporations of their property, or that the power of regulation of commerce should extend to the holding and devolution of title to real and personal property—and this without respect to whether the personal property is destined to enter into the channels of interstate commerce or not, and whether the real estate is destined to produce mineral or agricultural products intended for interstate channels or not.

These questions, interesting as they are, and overwhelming in importance as they would be, are not in fact in this case, and the decision of this case against the Government does not involve the denial to the Government of the strength under the Constitution to prevent or punish the engrossing

of a commodity, or of the raw material out of which a commodity is made. It has been history, both remote and recent, that those who attempted such have found themselves overwhelmed by economic conditions and have reaped only bankruptcy for their pains; and it is doubtful, after all, if there will ever be need of governmental interference in the field where economic and natural law is so efficient and so drastic. However that may be, there is not involved in this case, even to the slightest degree, the matter of monopolizing or attempting to monopolize by engrossing. None of these defendants owns an acre of land in America used in the production of leaf tobacco, the essential raw material for their product; no evidence is introduced of an attempt to injure competitors by cornering the leaf tobacco—no evidence, indeed, of the purchase of a pound of leaf tobacco not required for the legitimate uses of the defendant purchasing it as a part of its raw material; factories have been purchased, but buildings are convertible into tobacco factories over night, and in one case, at least, the principal defendant sold to a prospective tobacco manufacturer, who has since become a growing and prosperous competitor, a factory ready equipped.

Indeed, if one may judge of the theory of the Government by the petition which it filed—and we make this reference with diffidence, because so many of the allegations of the petition are utterly abandoned as far as testimony is concerned, that it would seem unfair to treat the petition as indicating anybody's mature theory of the litigation—or, if one may judge of the Government's theory by the volume and emphasis of the evidence introduced by it, it is not by engrossing that these defendants are believed by the Government to have offended—nor, indeed, by methods of purchase or manufacturing

at all—but by methods of selling their products. So we may repeat that this question as to the effect of the Sherman Anti-trust Law on the possible evil done by the man or combination of men who may hereafter exclude others from a given trade by buying, or seeking to buy, all of the commodity traded in, or all of the raw material out of which that commodity is made, and the additional question of tremendous import as to the power of the Federal Government to deal with such a situation, do not arise in this case.

IV.

Our Conception of the Meaning and Effect of the Sherman Anti-trust Law.

The Sherman Anti-trust Law was passed in 1890. It has from time to time been unused and unnoticed, but at other times it has been the subject of various and sometimes violent discussions by lawyers, publicists and economists. Taking the statute as it is written, and the decisions of this Court as its only authoritative commentary, we have a theory of the meaning and effect of the whole statute which does not seem to us ingenious or startling, but which makes the statute neither insignificant on the one hand, nor radical on the other, but constructive and conservative legislation:

We conceive that the meaning and effect of the statute is to preserve to every one opportunity and liberty to engage in interstate trade—to preserve such opportunity and liberty against the voluntary covenant or quasi-covenant of the trader, as

well as against the improper conduct of other persons. In our conception that is the whole law.

The first section in so far as it forbids contracts and combinations in restraint of trade, forbids any sort of an arrangement whether it be by actual covenant or other combination or device (not consisting of, or reasonably ancillary to, an actual change of ownership of property) whereby traders directly or indirectly agree to limit their activity in interstate trading, or where the result of the arrangement is to take away the incentive to such activity in interstate trade. The first section in forbidding the entering into a conspiracy in restraint of interstate trade protects the trader against outside interference—the crime of conspiracy in restraint of interstate trade undoubtedly has its typical instance in the *Danbury Hat* case, where the interference was by those themselves not engaged in interstate trade at all. As heretofore in our main brief argued at great length, the second section, when it forbids the monopolizing or attempting to monopolize any part of interstate trade, forbids the excluding or the attempt to exclude others from interstate trade (in our judgment, as already argued, in order to violate this section, the exclusion or attempt to exclude must be by means at least tortious either by common law or statute other than the Sherman Anti-trust Law in order to save this second section of the Sherman Anti-trust Law from absolute invalidity on account of vagueness and uncertainty of meaning, as well as to prevent the statute from destroying the very competition it was intended to foster). There are two distinctions between the violation of the second section of the Sherman Anti-trust Law and the violation of that part of the first section which forbids a conspiracy in restraint of interstate trade: The first is that conspiracy necessarily im-

ports action by two or more, whereas monopolizing may be by one; in the second place there may be a conspiracy in restraint of trade by strangers, not only to the trade restrained, but to all interstate trade as in the *Danbury Hat* case, whereas monopolizing or attempting to monopolize is injury done by a competitor—it is an attempt to exclude others in order that the offender may himself enjoy—it is an attempt to establish or maintain a unity by excluding from activity in the trade those not absorbed in the unity.

Since the filing of our main brief, indeed, since the argument of this case heretofore, Circuit Judge Gray, in the case of United States *v.* Reading Co. *et al.* (decided Dec. 8, 1910, and not yet reported), has emphatically endorsed the definition of monopolizing for which we contend:—

> "There must, however, be a clear, legal concept of the words 'monopolize' and 'monopoly' in order to properly consider the charge in this respect, as set forth in the petition. The word is hard to define, and no attempt at exhaustive definition need be made. It will suffice to say that the mere extent of acquisition of business or property achieved by fair or lawful means cannot be the criterion of monopoly. In addition to acquisition and acquirement, there must be an intent by unlawful means to exclude others from the same traffic or business, or from acquiring by the same means property and material things."

This interpretation keeps this legislation from being radical or revolutionary, and makes it a development of, instead of a departure from, the orderly growth of economic legislation. It becomes an application to interstate commerce of the doctrines of the common law. Whether offenses against the Sherman Law were criminal at common law or not, *no contract, arrangement or conduct has*

been condemned by this Court as against the Sherman Law which would have been favored at common law—no contract, or quasi-contract, has been condemned that would have been enforceable at common law. Early after the enactment of the law a contest was waged in this Court as to whether the statute forbade only "unreasonable" contracts in restraint of trade, or all contracts in restraint of trade, whether reasonable or unreasonable. With great respect, we submit that, although formally this Court gave the broader construction, it actually made the statute only co-terminous with the common law, for in the very decisions in which the broader construction was formally or nominally adopted,[1] Mr. Justice Peckham, for the majority of the Court, expressly and by name, excepted from the operation of the statute the typical contracts in restraint of trade—such as the covenant of a vendor entered into, in order to protect a good-will conveyed by him, not to compete with the vendee—which being "reasonable" were valid and enforceable at common law. We submit further that in the contests made in the early cases against the application of the statute in those cases, because the contracts there attacked were "reasonable," and therefore valid at common law, there was confusion as to the meaning of the word "reasonable." The word "*reasonable*" at common law, used in connection with the phrase "*restraint of trade*," was never synonymous with "fair," and never had as its word of contrast "extortionate;" a contract in restraint of trade at common law might be unreasonable and invalid although the prices fixed by such contract were altogether fair and moderate. The word "reasonable" has and had to do with the circumstances under which the contract in restraint of trade is made, and no contract in restraint of trade

[1] Trans-Missouri Case and Joint Traffic Case, *supra.*

was or is valid at common law unless *reasonable* in view of the other contract made, or relation created, by or between the parties, to which other contract or relation, the contract in restraint of trade is ancillary. The opinion of Circuit Judge Taft in the *Addyston Pipe* case[1] is a complete and superb demonstration of this common law doctrine, and Mr. Justice Brewer announced it again in his concurring opinion in the *Northern Securities* case.

We contend then that the Sherman Law applies to interstate trade, and to contracts, arrangements and conduct directly affecting interstate trade, the principles of the common law—making criminal and subject to Federal prosecution—if direct in their effect on interstate trade—some things that were criminal at common law, and some things that were forbidden at common law only in the sense that contracts for the doing of them were unenforceable; giving to Federal Courts jurisdiction in equity to prevent the things from being done which if done would be criminal; and giving an easy and tempting action at law to those who are injured by these things.

Surely a statute which applies to interstate trade only the principles of the common law, already and for a "time whereof the memory of man runneth not to the contrary" applicable to all intrastate or local trade, and for centuries believed sufficient to protect such trade against noxious combinations or restraints, ought not to be called radical or revolutionary.

Nor does this conception of the law make it insignificant. The statute had its origin not

[1] 85 Fed. Rep., 271.

in any supposed inefficiency of the common law, but because it was doubtful whether these principles extended to interstate trade, and there are no Federal common law crimes; most vital and well-considered statutes have their principal utility in the application of effective remedies to common-law wrongs. In our view there is no decision of this Court inconsistent with our conception of the law as just stated, but under the law there have been decisions of this Court which prevented competing railway companies from agreeing upon rates to be charged by them;[1] a decision which prevented the elimination of competition between railway companies by a scheme of their respective stockholders entered into for the express and only purpose of eliminating that competition;[2] a decision which prevented an agreement among the manufacturers of iron pipes that their competition should be only ostensible and not real;[3] and which gave to the purchaser who had paid an excessive price for his iron pipes on account of the existence of that arrangement treble damages as against a member of the illegal combination,[4] decisions which gave to the merchant or manufacturer injured by a boycott, whether of men banded together in what they called a labor union, or of others engaged in the same business as the injured party, treble the amount of damage suffered.[5] Surely legislation under which results so considerable and so salutary have been attained cannot be called insignificant or inconsequential.

We do not propose to enter into any lengthy re-

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[1]Trans-Missouri Case, 166 U. S., 290; Joint Traffic Case, 171 U. S., 505.

[2]Northern Securities Case, 193 U. S., 197.

[3]Addyston Pipe Case, 175 U. S., 211.

[4]Pipe Co. *v.* Atlanta, 203 U. S., 390.

[5]Loewe *v.* Lawlor, 208 U. S., 274; Montague *v.* Lowry, 193 U. S., 38.

view of the decisions of this Court in order to show that these decisions are each and every one consistent with our conception of the Sherman Law. Besides the references that have been made to these decisions in our main brief there have already been made herein references to most of the Anti-Trust decisions.

Of course, if our conception of the law is correct the *Knight Case*[1] was correctly decided, because in that case there was involved only the purchase of property, and there was not involved the slightest interference with liberty or opportunity for trading, or in the slightest degree any arrangement or combination whereby an incentive to engage in interstate trade was removed—there were not in that case even the ordinary covenants given by vendors to protect the good will conveyed. To argue that one cannot lawfully purchase a factory building because there is thereby removed the incentive to the previous owner of the factory to engage in interstate commerce, or that one cannot sell his factory building because there is thereby removed his own incentive to further engage in interstate commerce, is so startling that the Government itself shrinks from the bald statement.

The *Trans-Missouri* case, the *Joint Traffic* case, the *Addyston Pipe & Foundry* case and the *Swift* case are typical instances of contracts, or *quasi*-contracts, that limited the freedom of the parties thereto in their interstate trade—and this was unlawful whether the prices to be charged, or paid, by the parties, for goods, or services, were fair or extortionate.

The *Northern Securities* case was, in the view of the majority of the Court, exactly of the type of the Trans-Missouri and Joint Traffic cases, because there was presented no case of actual investment,

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[1]156 U. S., 1.

but, instead, a scheme by the stockholders of competing railway companies whereby a custodian was created to hold and vote stock of such competing railways, which custodian, according to the scheme, was to have and had only the function of voting the stock and drawing and distributing the dividends. The sharp division in this Court was as to whether this was the proper conception, or whether there was not in fact (or at least beyond judicial question) involved a real investment by the Northern Securities Company in these stocks, but, with the facts conceived as the majority of this Court conceived them, there can be no doubt that the scheme involved in the Northern Securities case was obnoxious to the common law;—no court of equity, at common law, if satisfied that such was the scheme, would have enforced the contract on the part of a stockholder to deliver his stock to the custodian corporation in furtherance of the scheme. That the Northern Securities Company was thus conceived by a majority of this Court is plain, not only from the concurring opinion delivered by Mr. Justice Brewer, but from the opinion of the Court delivered by Mr. Justice Harlan. It is toward the close of the opinion of Mr. Justice Harlan that he states with emphasis this view of the mere custodianship of the nominal owner, which being adopted by the majority of this Court, brought about the decision that was made.

> "It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in

any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, 'Why put the stocks of *both* these (constituent companies) into one holding company?' He frankly answered: 'In the first place, this holding company was simply a question of *custodian*, because it had no other alliances.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this Court in *United States* v. *Joint Traffic Association*) 'smothering' competition between the lines of two railway carriers."

This, then, is our conception of the effect of the Sherman Law, to-wit: the preservation to every

one of liberty and opportunity to engage in interstate trade, against his own voluntary contract or *quasi*-contract, and against the improper conduct of other persons, and this is but saying that the Sherman Law applies to interstate trade, and transactions and conduct directly affecting interstate trade, the principles of the common law already applicable to intrastate and local trade. If this conception is applied to the record in this case, the questions involved are reduced to very simple terms, to-wit:

First, Have these defendants conspired with each other or with any other person to exclude others not engaged in such conspiracy from trade; or have any of the defendants, acting independently and not in co-operation with others, excluded or attempted to exclude others from trade by unlawful means? These defendants, without burdening the Court by repetition, insist with all the emphasis of which they are capable, and in all sincerity, that there is no proof in this record of any such result or attempt. If the Government believed that any conduct of any of the defendants persisted in would have that effect, it was the duty of the Government to point out such conduct and ask for an injunction to prevent the continuance or repetition of such. The lower Court is express and impressive in its finding that there is no evidence of such result, or such attempt.

Second, Have the defendants or any of them become parties to, or beneficiaries under, any contract, or *quasi*-contract, whereby they or any

traders have restricted the liberty and opportunity which they or the other traders had before for engaging in interstate commerce? We cannot conceive of any contracts, or *quasi*-contracts, that can be said to be such. The only contracts, or *quasi*-contracts, that are in restraint of trade at all—that are in any way restrictive of any one's liberty or opportunity of trading—are the covenants taken from vendors to various of the vendee defendants. We have already argued, upon the facts and upon the law,[1] that every covenant taken by any of these defendants was taken when such defendant was the vendee of a business which had a good will, the reasonable protection of which required the execution of the covenant, and that each and every one of the covenants is valid and binding. If any of the covenants go beyond this, it was, we submit, the part of the Government to direct the attention of the Court thereto, and to the circumstances that made it unreasonable, and to ask the Court that this particular covenant be declared void and unenforceable. The lower Court found none.

Third, Have the corporation defendants in their intercorporate relations eliminated the proper incentives to activity in interstate trade of any of such corporations, so as to bring themselves, or their relations and conduct, under the condemnation which, according to the view of the majority of this Court, the Northern Securities Company deserved? This last question requires a longer consideration than either of the other two, but in our view it imposes no greater difficulty upon, and is no more embarrassing to, these defendants.

Although seriously and confidently combatted by us, we will assume now for the sake of the argu-

[1]Main Brief of these defendants, pp. 140-145; 247-251.

ment that the principles of the *Northern Securities case* have equal application to industrial companies as to railroad companies, engaged though industrial companies are primarily in manufacturing with no public interest or duty, and with no obligation to engage in business at all, and certainly, therefore, no duty to continue in competition. Thus understood, and with these concessions made for the sake of the argument, we conceive that the principles of the Northern Securities Company would forbid the "holding company" in industrial affairs.

The phrase "holding company," like the word "trust," itself is not always used with precision. As we understand a holding company, it is not simply a company that holds some stock in other companies, but it has several additional characteristics, and it is accurately defined about as follows: A company which receives into its treasury in exchange for its own shares, and as a part of a general scheme, all or a majority of the shares of various competing companies, which companies continue to operate, but with the incentive for their individual activity in interstate trade removed by the fact that they are all controlled by the same entity, the holding company, which, and whose stockholders are not interested in the success of any particular competitor, but interested only in the aggregate results. Thus defined, the holding company becomes the corporate synonym of the individual trustees under the old trust agreement, which was in some vogue in 1890, when the Sherman Law was passed, and which is mentioned in the Sherman Law as one of the methods of combination that is condemned; thus defined, the holding company is not, in any correct sense, the purchaser of the shares held by it, but is the mere custodian, and the certificates of stock issued by it are, in essen-

tial respects, identical with the trust certificates issued by the old trustees.

If this definition is correct neither The American Tobacco Company nor any other of these defendants is a holding company at all. There are a great many corporations defendants in this case, connected directly or indirectly by inter-stockholding, but, by a process of elimination, it will be seen how far any of these defendants are from holding companies in any of the essentials of the definition just given:—

(*a*) None of the defendants has as its principal business the holding of stock in other corporations at all, but each is engaged principally in active operating business. The American Tobacco Company is a manufacturing company, manufacturing its own goods in factories owned by it, marketed by it in its own name. In 1907 it manufactured in its own factories more than three billion cigarettes, whereas only about seven hundred million were manufactured in factories of subsidiary companies, and of this latter number over five hundred million were made by S. Anargyros, created by The American Tobacco Company and always owned by it, and which constitutes in reality only a department of its business;[1] of little cigars The American Tobacco Company manufactured in its own factories over nine hundred million, while the output of all of its subsidiary companies was only eleven million;[2] of plug and twist tobacco The American Tobacco Company manufactured over ninety-eight million pounds, while the output of subsidiary com-

[1]Record, Vol. V, Ex. 77.
[2]Record, Vol. V, Ex. 81.

panies was only thirty-eight million;[1] of smoking tobacco The American Tobacco Company manufactured in its own factories fifty-eight million pounds, while sixty-nine million pounds was manufactured in what are called subsidiary companies, but of this sixty-nine million pounds nearly twenty-three million pounds was manufactured by Blackwells' Durham Tobacco Company and Spaulding & Merrick, both corporations created by The American Tobacco Company and always owned by it and which companies constitute only departments of its business;[2] of fine cut tobacco nearly seven million pounds were manufactured by The American Tobacco Company and Spaulding & Merrick, really a department of it, whereas only about one million and half were manufactured by subsidiary companies.[3] The American Snuff Company manufactured in its own factories over nineteen million pounds of snuff, while less than three million pounds were manufactured by its subsidiary companies.[4] The American Cigar Company manufactured in its own factories over eight hundred and fifty million cigars and cheroots, while less than two hundred million were manufactured by all of its subsidiary companies combined.[5] The American Stogie Company manufactured over ninety-two million cigars or stogies and it had no subidiary company engaged in the manufacture of cigars or stogies at all.[6] MacAndrews & Forbes Company manufactured over forty-two million pounds of licorice paste and more than one million pounds of licorice powder in its own factory, and it had no subsidiary

[1]Record, Vol. V, Ex. 79.
[2]Record, Vol. V, Ex. 78.
[3]Record, Vol. V, Ex. 80.
[4]Record, Vol. V, Ex. 82.
[5]Record, Vol. V, Ex. 83.
[6]*Ibid.*

companies. These are the companies condemned by the decree below as constituting in themselves illegal combinations. None of them is as to any of its products principally engaged in holding stock, and some of them hold no stock at all in any company engaged in a like business with itself. The Northern Securities Company did not propose to run a railroad at all, but had, as its only actual or contemplated function, the control of companies that did operate railroads!

(*b*) In the next essential these defendants are also without and not within the definition of a holding company, to wit: Principally the stocks held by them respectively are not of companies which would be natural competitors. To illustrate, Mengel Box Company is engaged in the manufacture of boxes used in packing plug tobacco; below The American Tobacco Company was enjoined by the decree below from voting its stock in the Mengel Box Company. Undoubtedly The American Tobacco Company is a holding company with respect to this stock in the Mengel Box Company, in the sense that it holds that stock, but upon what possible theory is it to be forbidden to continue to hold and vote that stock? No trade activity is limited, and even if competition is the key note of the Sherman Anti-Trust Law, there is and can be in this way no elimination of competition between a tobacco manufacturer and a box manufacturer, because no competition would, in any event, be expected between them. So, also, by the decree of the Court below, The American Tobacco Company is forbidden to vote the small minority of stock that it holds in Acker, Merrill & Condit Company, a company engaged in dealing in groceries and cigars,

never engaged in the manufacture of tobacco or any of its products, and never in competition, actual or potential, with The American Tobacco Company.

The five principal defendants own stock in non-competing companies as follows:

In related but not competing companies—Held by The American Tobacco Co.:

American Snuff Co. (a minority interest).
American Cigar Co.
Imp. Tob. Co., Ltd. (a minority interest).
British Am. Tob. Co., Ltd.
Manhattan Briar Pipe Co.
Kentucky Tobacco Product Co.
Porto Rican American Tob. Co.

In Supply Companies—Held by The Am. Tob. Co. (in some of these Companies other of the defendants also own stock, but The Am. Tob. Co. owns a majority):

McAndrews & Forbes Co. (licorice).
Conley Foil Co. (tin foil).
Golden Belt Co. (cotton bags).
Mengel Box Co. (wooden boxes).
Amsterdam Supply Co. (purchase of supplies).
Thos. Cusack Co. (bill-posting).

In Machinery Companies—Held by The Am. Tob. Co., or Am. Cig. Co.:

American Machine & Foundry Co.
New Jersey Machine Co.

International Cigar Machinery Co.
Standard Tobacco Stemming Co.
Garson Vending Machine Co.

In Mercantile Companies, not in competition with each other because of locality—Held by The Am. Tob. Co. or Am. Cig. Co.:

M. Blaskower Co. (San Francisco).
R. D. Burnett Cigar Co. (Birmingham, Ala.).
Dusel, Goodloe Co. (Philadelphia).
Cliff-Weill Cigar Co. (Richmond, Va.).
J. J. Goodwin Tob. Co. (Atlanta, Ga.).
Jordan, Gibson & Baum (Memphis, Tenn.).
Crescent Cig. & Tob. Co., Ltd. (New Orleans).
The J. B. Moos Co. (Chicago).
Corp. J. & B. Moos (Cincinnati and Cleveland).
Star Tob. Co. (Wilkesbarre, Penn.).
Smokers' Paradise Co. (Atlantic City, N. J.).
United Cigar Stores Co. (retailers in several large cities).
Acker, Merrall & Condit Co. (New York —small minority interest).

In Real Estate Companies: For farming in Cuba or Porto Rico (not in the United States) or because foreign companies cannot hold real estate even for a factory in

Pennsylvania—Held by The Am. Tob. Co., Am. Snuff Co. or Am. Cig. Co.:

Cuban Land & Leaf Tob. Co.
Fed. Cigar Real Estate Co.
Garrett Real Estate Co.
Porto Rican Leaf Tob. Co.

Companies which were never active or which had ceased all activities before 1907:

M. Valle y Co.
Union American Cigar Co.
London Cigarette Co., Ltd.
Louisiana Tob. Co.
Ind. Co. of Porto Rico.
Cuban Tobacco Co.
Vuelta Abajo S. S. Co.

Certainly, as to all the foregoing Companies, and the ownership of their stock by the defendant companies that own them, there must be a complete distortion of all the logic of the *Northern Securities Co. case* and the criticism of the "holding company" based upon it, before such can be condemned. But these constitute the vast majority of the corporation defendants, and it is precisely this stockholding that is condemned by the decree of the Court below, and whose condemnation is sought in this Court by the Government.

(*c*) In order to fall within the condemnation visited upon "holding companies," there must be something besides competition between the holding company and the company held, or between the different companies that are held; the holding com-

pany must bear the actual relationship of a custodian, and not an investor, with its shares issued in exchange for the shares of the respective companies in furtherance of a scheme for the operation of the companies in co-operation, instead of independent activity. A detailed examination of the companies that have not already been eliminated, under the next preceding heading, shows how far from this is the condition of these defendants.

The following are the companies, organized and always owned by the company indicated, to which the company itself, or some vendor (to whom cash was paid) by its direction, conveyed property and business previously owned by the principal company itself, or then to be acquired by the principal company.

By the American Tobacco Co.:

Blackwell's Durham Tob. Co.
Spaulding & Merrick.
Day & Night Tobacco Co.
S. Anargyros.

By American Cigar Co.:

Havana-American Co.
Federal Cigar Co.

By Mengel Box Co.:

Columbia Box Co.
Tyler Box Co.

By Kentucky Tobacco Product Co.:

Kentucky Tobacco Extract Co.

All of these were organized in accordance with the laws of their respective States, and are, and always have been operated simply as departments of the companies owning them respectively. The Sherman Anti-trust Law was never intended to control the discretion of a sole owner in the conduct of his business. So long as he conforms to the law of his State, and injures no one in his interstate trade, he may, for greater efficiency or any other reason, divide his business into departments, or not, as he chooses, and if he conceives that such process is enhanced by the formation of separate corporations he may adopt that method.

The following companies are owned outright by the companies indicated, all of their stock having been acquired, generally at one time, but in some instances from time to time. The principal company has continued its ownership of stock instead of direct ownership of assets, because it has conceived that in this way the business would be more efficiently or more economically conducted. *In every instance the stock was acquired for cash, and in no single instance by an exchange of stock—in every instance there is an investment and not a custodianship,* to wit:

By the Am. Tob. Co.:

F. F. Adams Tob. Co.
Butler & Butler, Inc.
Luhrman & Wilbern Tob. Co.
Nall & Williams Tob. Co.
Nashville Tobacco Works.
R. A. Patterson Tob. Co.
Monopol Tobacco Works.
Wells-Whitehead Tob. Co.

By American Snuff Co.:

H. Balander.
De Voe Snuff Co.
Standard Snuff Co.

By British American Tob. Co.

T. C. Williams Co.

By Conley Foil Co.:

Johnston Tin Foil & Metal Co.

The following are companies engaged in a generally similar business with the company that holds a majority of their stock; the stock is held exactly in accordance with State laws and exactly as appeared in a very recent case by Circuit Judge (now Justice) Lurton:[1]

By The Am. Tob. Co.:

The John Bollman Co.
F. R. Penn Tob. Co.
R. P. Richardson, Jr., & Co., Inc.
R. J. Reynolds Tob. Co.
Pinkerton Tob. Co.
Reynolds Tob. Co. (of Bristol, Tenn.).
J. W. Carroll Tob. Co.
P. Lorillard Co.

[1]Bigelow *v.* Calumet Co., 167 Fed., 721.

By British Am. Tob. Co.:
David Dunlap, Inc.
W. S. Mathews & Son.

By American Cigar Co.:
American Stogie Co.
Porto Rican Am. Tob. Co.
Havana Tobacco Co. (and Cuban Companies owned by it).

By R. J. Reynolds Tob. Co.:
Lippert-Scales Co.

These companies should be discussed in some detail: The stocks owned by The American Tobacco Co., it acquired for cash, except as to the last two—the J. W. Carroll Tobacco Company and the P. Lorillard Co. The American Tobacco Co. secured the stock it holds of the J. W. Carroll Tobacco Company by a contract under which it manufactures and sells the brands of tobacco owned by the Carroll Co. The P. Lorillard Co. is really a department of The American Tobacco Company, whose corporate entity is maintained solely for the benefit of its individual preferred stockholders as explained in our main brief.[1] The American Tobacco Company holds part of the preferred stock of the P. Lorillard Co., for which it paid cash and owns all of the common stock of that company, in exchange for which Continental Tobacco Company issued its stock. *The common stock of the P. Lorillard Company is the only stock in any company*

[1]Main Brief, Am. Tob. Co., p. 85.

held by any of the five principal defendants in this litigation acquired by the issue of the stock of the owning company, or any predecessor of the owning company. How far removed from the holding Company scheme!

British American Tob. Co., Ltd.; American Cigar Co., and R. J. Reynolds Tob. Co., acquired by direct purchase and investment, and not by any issue of stock, the stock in other companies held by them respectively. The Havana Tobacco Company—a minority of whose stock is owned by American Cigar Co. (and none by any other of the defendants) a company not embraced in the decree of the Court below and which took over the stock of companies operating cigar factories in Cuba—and nowhere else in the world, though the products sold in Cuba are consumed throughout the world—is the only defendant in this litigation which has substantially issued or exchanged its own stock for the stock of other corporations.

We believe that we have demonstrated that the intercorporate relations of these defendants are not such as to bring any of them within the proper definition of a "holding company," or upon any of them the condemnation of having violated the Sherman Law by the improper elimination of incentive to engage in interstate trade. Nothing is left for the Government, logically, but to dispute this whole conception of the law, and rely on the doctrine announced by Circuit Judge Lacombe, and now repudiated, illogically, by the Government, to-wit: that any acquisition of the business of an interstate trader by one theretofore engaged in such trade;

or any formation of a partnership even between individuals who have been driving rival express wagons between villages in two contiguous States, is violative of this statute—thus construed, revolutionary, indeed, as characterized by Judge Lacombe. That position we have sufficiently discussed in our main brief.

Respectfully submitted,

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Jany. 3, 1911.

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JAMES H. McKENNEY,
Clerk.

CTOBER TERM 1910 — Nos. 118 AND 119

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Petitioner-Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Defendants-Appellees.

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Appellants,

against

THE UNITED STATES OF AMERICA,
Appellee.

OSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

EF AND ARGUMENT FOR THE DEFENDANT THE AMERICAN TOBACCO COMPANY AND CERTAIN OTHER DEFENDANTS-APPELLEES IN THE FIRST OF SAID APPEALS AND APPELLANTS IN THE SECOND.

WILLIAM M. IVINS,
Of Counsel.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Petitioner-Appellant, *against* THE AMERICAN TOBACCO COMPANY and others, Defendants-Appellees.	118
THE AMERICAN TOBACCO COMPANY and others, Appellants, *against* THE UNITED STATES OF AMERICA, Appellee.	119

CROSS APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND ARGUMENT FOR THE DEFENDANT THE AMERICAN TOBACCO COMPANY AND CERTAIN OTHER DEFENDANTS-APPELLEES IN THE FIRST OF SAID APPEALS AND APPELLANTS IN THE SECOND.

WILLIAM M. IVINS,
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I.

THE FACTS — GENERALLY.

The group of sixty-five corporations and twenty-nine individuals, and the aggregation of capital and expert management represent and are typical of the highest and most perfectly developed economic organization.

This special organization of part of a field of national industry looking to the largest possible contribution to the national income, through the largest avoidance of economic waste, is the result of no contemplated violation of any particular legislation, but is part of universal practice and general custom.

All of the corporations defendant are authorized by law. Their correlation is a natural and necessary consequence of freedom of competition, of exercise of the rights of property and contract, of an economic evolution the historical antecedents and efficient causes of which reach back to the beginnings of manufacture and commerce. Each successive stage in the evolution conforms to the laws of economic progress based upon the requirements of the vastly increased modern populations, and the new markets of which national communities are the units in that larger and inclusive single market which is the entire world.

The existence and correlation of these corporations is the natural and necessary consequence of the physical law of the conservation of energy, the economic law of maximum of result with minimum of effort, and the particular manifestations of these laws in stil

others, namely, the substitution of the special powers of nature for the physical power of man, the division of labor, the aggregation of capital, the localization of industry, the specialization of business management, and the largest elimination of risk through the perfection of the organization of the knowledge of the conditions of supply and demand.

These are the essential and dominant facts of this case. The whole record demonstrates this with a clearness and precision which makes it a precious and unique document for the uses of economic history.

The problem of law is a problem of definitions.

The problem of fact is to determine whether the case falls within the definitions.

The fundamental questions are these:

Is the Anti-Trust Act of 1890 a criminal statute in development of the law against conspiracies and unlawful combinations, or

Is it a legislative attempt to modify an existing, and establish a new, economic order —

Is it an intervention of the Nation for the punishment of new manifestations of an old category of crime, or

Is its purpose to limit freedom of association and to attempt to establish economic, instead of legal, equality, by the action of Government?

The particular organizations which are now attacked by the Government as an economic group or system are shown by the evidence not to have been designed or intended as an evasion or violation of any statute — but to be symptomatic of our entire industrial civilization. It has grown in conformity with custom and universal practice and is due to the same fundamental causes which have made our nation continental and a single economic unit — which have made the national political constitution and the national economic constitution coterminous — which have made

our currency system and our banking system national — which have nationalized our highways and which, in the field of the mechanism of physical distribution, have resulted in the evolution of another type of approximately perfect industrial organization, the great railway systems of the country.

It is not proved by the Government that the defendants or any of them act as a pool or kartell and sell for, or regulate the prices of, those who have been or would otherwise be competitors, or that the defendants exist as the result of an intent to monopolize or restrain trade.

The charges of the Government are that the American Tobacco Company, and the companies it is interested in, have acquired the property of competing manufacturers and sellers of tobacco products; that the defendants are now doing a volume of business which has, as matter of fact, amounted to a monopoly; and that the relations between the defendants and their method of conducting their respective businesses is, as matter of fact, a restraint of free competition.

All of these things, together with the industrial organization of which the defendants are types, are the results of a common cause and a common law and of a practically simultaneous economic necessity. The corporate defendants are all alike, spontaneous and inevitable social and economic groups — growths not creations.

They exist for the realization of the chief advantages of large scale production through economy of skill, economy of machinery, economy of material, economy of distribution, and perfection of knowledge, to the end that the production cost be reduced to the manufacturers and the consumption cost to the ultimate consumer.

Buying in large quantities defendants buy cheaply while encouraging the development of increased and

steady production of raw material; manufacturing in large quantities they thus reduce the manufacturing cost per unit of production; selling in large quantities, they thus make their profits on volume of business without increasing, but generally reducing the price to the consumer of the unit of consumption.

Through the subdivision of the work of business management and the facilities for employing the greatest natural and the most highly trained business ability they minimize the risk of error.

The defendants specialize manufacture and management by subdivision and segregation, the avoidance of cross-division and the elimination of diversity of plan and purpose in purchasing, management, manufacture and selling; encourage invention and originality; equalize markets, avoid overproduction, labor crises, and shut downs; and pay higher wages under collective or individual contracts.

They do large scale business where such business is most economic, shun it where it is not economic, avoid experiments that fail, and eliminate from the business as a national enterprise the bankruptcies and consequent losses to the community incident to speculation, incompetency, error, and the vicissitudes of economic anarchy.

Their officers perform a public as well as a private function in forecasting the broad movements of production and consumption and in appraising opportunities and consequences. They are chosen for economic reasons, for character, creativeness and technical fitness, as officers of social groups in which these qualifications are the sole and necessary determinants.

The defendants thus supply the opportunity for the realization of the national assets of character, purpose and ability, which opportunity had become nonexistent for want of individual credit and capital under the outgrown and unrestorable system of small individual industries.

The defendants have, within their own field, fulfilled the economic law of increasing return to the national income. They distribute a larger aggregate dividend to both labor and capital and by balancing the economic laws of increasing and diminishing return they conform to this other economic law, viz., the law of constant return to both labor and capital. They equilibrate demand and supply and avoid crises in both fields.

There is no evidence of any combination or conspiracy between the defendants or any of them to restrain trade or to create a monopoly, or evidence of designed or intentional effort to dominate prices, or to eliminate, or interfere with the free play of competition, or to injure or wrong others in their business or to impede others or impair the exercise by any one of his right to enter upon or engage in business, except so far as a recognition of his own limitations and of economic conditions may deter him therefrom.

There is no evidence of coercion, or duress or unfair dealing by any of the defendants, or of any prevention by any of them of the right of free trading.

The facts of this case demonstrate that the defendants as a group have acted in strict conformity and obedience to the law of the structural organization of industry and business in respect of the universal economic tendencies of division of labor,— of union on the one hand and of differentiation and integration on the other,— and that they have in all things conformed to the forces which have universally brought about the differentiation of trades and business in the "making" processes, and the integrating of methods and business organizations in the "distributing" processes.

The evidence shows that the business of the defendants as a whole is that of a group, not a centralized

unity. It is a co-operative federal industrial organization of self-governing departments and units in which there are many thousands of shareholders, citizens of the whole Union and of the world, and with a spontaneous and natural cross-division or overlapping of ownership. The whole, as the record shows, is comparable to a living organism, with " an organic co-ordination of parts resting upon a complexity of business cells."

In place of wasteful antagonism and chaotic mutual destructiveness in a great field of national industry it contributes a large share of the cost of government, while it has at the same time produced equilibrium of minor forces of disturbance by enabling these to compensate and cancel each other.

The defendants promptly utilize inventions and discoveries, of all classes and kinds, without reference to the perpetuation of antiquated methods and processes, stimulate the factors of agricultural production, organize the factors of mechanical production, forecast and stimulate demand and share their gross income with the Government.

Each of the defendants is in a position of economic and functional independence. The reticulation of interests and of overlapping ownership are shown by the record to work no harm, injury or restraint of any one now engaged in the same businesses. And there is no evidence that the state of affairs has been brought about by harm to, or injury or restraint of, any one heretofore engaged in like businesses.

Each of the defendants realizes one of the most important elements of economy and of technical efficiency of organization, in the ability to buy and sell in large quantities and under long contracts. Such contracts reduce to a comparatively low level the unnecessary uncertainties of business. This enables the managers " to count upon a certain market for their product and

a certain cost for part of their raw material," and its chief object is " to diminish the hazards of unregulated competition and to subject large business operations to effective control."

Each of the defendant corporations is the result of the natural tendency of industry to seek the most economical business unit. The record demonstrates that the co-operative groups of the defendants are not the result of a single centralized purpose and management but of associational law and are the result of the economic forces which work for:

1. The unit of cheapest production in a single productive process.

2. The creation of units of cheapest production as single companies.

3. The co-operation of such economic groups through community of ownership.

4. The skilled decentralization of administration.

5. The securing to all members of the co-operative group the best possible financial facilities, in order to enable growth and improvement, and to supply credit for the most efficient conduct of the business of the corporate defendants severally.

The transactions shown by the record are:

First — Corporate existence authorized by the laws of the different States.

Second — Creation of corporations as business agents for the purpose of perfecting distributive business organization, and the ownership by one larger company of these departmental companies, i. e., the incorporation of departments for more perfect and efficient specialization, correlation and coherence — all authorized by the laws of the States.

Third — The purchase by one corporation of the property of another.

Fourth — The purchase and holding by one corporation of a part of the shares of another.

Fifth — The purchase of raw material and its receipt at different points of manufacture.

Sixth — The shipment of finished products to different points of sale.

Seventh — The sale over the counter at retail of the finished product by some of the defendants.

Eighth — The sale of the finished product at wholesale.

II.

THE STRUCTURAL ORGANIZATION AND INTERRELATION OF DEFENDANTS.

We now turn to the structural organization and interrelation of the principal corporation defendants, and having shown that, shall shortly summarize the results of the operations of the defendants.

The original *American Tobacco Company* was organized prior to the passage of the Sherman Act with a capital of $25,000,000, which by 1899 had been increased to $70,000,000. It acquired by purchase plants and assets of other dealers and manufacturers at prices satisfactory to the latter.

From time to time it disposed of different departments of its business and some of its plants to other companies, taking in payment therefor shares of such companies and going out of the business so disposed of.

In 1904, the American, the Consolidated and the Continental Companies were merged under the authorization of the State of their creation, New Jersey, under the name of "The American Tobacco Company" and thereafter the three merged companies went out of existence.

Since the consolidation of 1904 The American Tobacco Company has owned and is now operating plants and factories in nine states for the manufacture of smoking and plug tobacco, cigarettes and little cigars. It buys its tobacco wherever possible di-

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rectly from the grower, and uses all the grades which are grown — these grades not being substitutes for each other and there being no standardization of any of the grades, all purchases being of lots varying in price according to quality and condition.

It purchases many of its general supplies from some of the defendants and sells part of its product to others of them.

Its shares are held by several thousand individuals here and abroad.

Of the business done in this country, it is now manufacturing about 70 per cent of the smoking tobacco; about 81 per cent. of the " plug " and " twist "; 81 per cent. of the " fine cut "; about 73 per cent. of the cigarettes; and about 89 per cent. of the little cigars.

It manufactures no licorice paste, tin foil, bags, boxes or other supplies, but buys these through others of the defendants or generally in the market.

Since its organization it has not increased the price of any of its products.

It did not cut the price of plug tobacco, but the plug war was made upon it, and not by it, and as before stated, it subsequently went out of the plug business altogether.

The American Tobacco Company never was and is not now a holding company in the sense of being a custodian or trustee, as was the Northern Securities Company. It is not such and was never designed as such. It is a great manufacturing corporation with an actual investment interest in other businesses paid for by it in cash or shares.

The total output of all the concerns in which it had an interest in 1906 was 3,900,000,000 cigarettes, of which it manufactured 3,200,000,000 in its own factories. It itself manufactured 942,000,000 little

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cigars, while the factories belonging to companies in which it holds shares manufactured but 12,000,000. It manufactured 98,000,000 pounds of plug tobacco in its own factories while the amount manufactured in the factories of companies in which it holds shares was 68,000,000. These facts clearly distinguish the nature and business of the company from the nature and business of a holding company such as the Northern Securities Company.

It has increased its own business as well as the business of all competitors, and thereby increased the business of the country at large through stimulating consumption.

It controls only one out of 5,000 jobbers, and is interested in only 409 out of 600,000 retailers.

From time to time when purchasing shares, plants, good will, brands, etc., it has entered into contracts with individual vendors whereby the latter have agreed not to re-enter the business.

The United Cigar Stores Company has an outstanding capital stock of $1,650,000. It conducts retail stores in large cities in this country. Its sales at retail in 1907 amounted to $16,000,000. All of its sales are made for cash over the counter. It deals in all kinds of smoker's supplies. It receives no special prices or advantages from the defendants or any of them. Its business is exclusively that of distributing to consumers. Its sales are only a small fraction of the total retail sales in this country.

Of this company the court below says:

"No special privileges are accorded by the Tobacco Company to the Cigar Stores Company over other purchasers. Its business is conducted in its own way, without dictation from the Tobacco Company. I do not overlook certain sporadic instances of fault-finding and attempted interference in the business by certain officers of the Tobacco Company but these attempts are negligible and should not be considered in

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determining the general character of the business. Generally speaking the relations existing between the two were those of a manufacturer and a retail customer, to whom the manufacturer sells direct."

MacAndrews & Forbes Company is engaged in the manufacture and sale of licorice paste, which it supplies to the entire trade without distinction, and it is and has at all times been willing and ready to supply the trade upon the same terms and conditions that it supplies different of the defendants. The total domestic output of licorice paste is $4,000,000, of which this company has manufactured and sold about 95 per cent. It offers to sell to all comers at the same terms at which it sells defendants. The value of its goodwill is in its formulas and brands and the reputation of its product.

American Cigar Company and the companies in which it is interested are engaged in the manufacture of cigars in this country, Cuba and Porto Rico.

It has never done one-half of the business done in Cuba and only 25 per cent. of its Cuban product is brought into the United States. It has never done more than 16 per cent. of the cigar business of the United States, which was its proportion of the business at the beginning, and it now does but 14 per cent. Out of total sales of $350,000,000 of cigars in the United States the American Cigar Company has never exceeded $50,000,000.

It has no interest in the business of any retailers and controls only 6 out of 5,000 jobbers.

Conley Foil Company manufactures about 75 per cent. of the tin foil manufactured in this country, of which between 70 per cent. and 75 per cent. is taken by the defendants. It does its business in competition with LeMaher, Schwartz & Company and J. J. Crook Company. It sells manufacturers generally and its sales to the American Tobacco Company and others of

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the defendants is on the basis of a graded price per pound over cost of raw material. It is at all times ready and willing to sell to all comers on the same terms as to defendants.

American Stogie Company has a capital stock of $11,976,000. It is one of the companies in which the American Cigar Company is interested and is covered under that title.

Amsterdam Supply Company buys certain classes of supplies necessary in the tobacco business, but no leaf tobacco. It does a general market business. Its entire capital stock is held among the defendants and it buys for them as well as for others, charging defendants a commission of 1 per cent. for goods sold them and parties other than defendants 2, 3 or 5 per cent. as it is able to do. It is purely a co-operative purchasing company of the same nature as any other co-operative purchasing association. It handles only a small fraction of the total classes of supplies in which it deals.

British American Tobacco Company, Ltd., is engaged in the sale of tobacco products throughout the world except in Great Britain and the United States. The American Tobacco Company own two-thirds of its capital stock. It does no business in the United States or Great Britain and but a small part of the world's tobacco business outside of those countries. During its life of seven years it has increased the use of American leaf for export from 20,000,000 to 30,000,000 lbs. a year.

American Snuff Company.—Its capital stock is $25,000,000, of which the other defendants among them own about 40 per cent. It does about 96 per cent. of the business of the United States. The original, The Atlantic Snuff Company, was not organized by the American Tobacco Company or the Continental Tobacco Company, and the American Snuff Company is

not now controlled and never has been controlled by the American Tobacco Company. The Snuff Company has doubled its own business since the time of its organization, and the total volume of business done by its competitors has also increased.

Golden Belt Manufacturing Company is engaged exclusively in the manufacture of bags and textile supplies. The different manufacturers may buy from competing concerns and are under no necessity of taking their requirements from the Golden Belt Company. Its business is an infinitesimal part of the cotton textile business of the United States.

Mengel Box Company manufactures boxes, including boxes for tobacco. It supplies the American Tobacco Company under five-year contracts at sliding prices based upon the price of lumber. Its product is an infinitesimal part of the box business in the United States.

III.

THE GENERAL FACTS OF THE TOBACCO INDUSTRY.

We now turn to the general facts of the tobacco business.

The total crop of leaf tobacco in the United States in 1905 was 921,000,000 pounds, of which the defendants between them took 418,000,000 pounds, which proportion held good for 1907. But, notwithstanding the contentions of the Government, these particular figures mean nothing for the purpose of this argument inasmuch as " tobacco " is a generic botanical term and not a market term any more than meat, vegetables, clothes, wood, fruit or furniture as generic terms are market terms. Tobacco varies in kind and each kind has its own market. The price or value of each kind is determined by the grades and qualities of parcels as bought. The crops are not competitive nor is their manufactured product competitive any more than shoes, stockings and hats are competitive, or umbrellas and underclothes.

There are four great or major crops and six small or minor crops in the United States, and each of these crops in turn is subdivided into kinds. Crops do not compete with each other, but the grades or qualities within the crops do. All of the defendants competed with each other in the purchase of their respective requirements of leaf.

Treating the crops as a whole the competitors for its purchase outside of the defendants, who, as we repeat,

compete among themselves, are other American manufacturers, manufacturers in foreign countries in which there is no governmental monopoly and the purchasers for account of the government in France, Austria, Italy, Spain, Portugal and Japan. These latter buyers, known as the Regie buyers, take about 100,000,000 pounds of the crop and the Imperial Tobacco Company of Great Britain takes 50,000,000 pounds of the crop.

None of the defendants are interested in reducing the price of tobacco to a point where the grower will devote his land to other purposes; and all are interested in sustaining the price at a point which makes it profitable for the grower to produce the crop.

None of the defendants own any tobacco lands.

None of them have ever enjoyed any advantages over their competitors in respect of rates of transportation.

Competition has at all times been free and open.

There is nothing in the record to show that the defendants or any of them have ever had recourse to wrongful or oppressive methods to affect or influence the business of its competitors.

The value of the tobacco products of all kinds produced in the United States in 1907 was about $565,000,000, of which the defendants as an aggregate produced about $212,000,000, or less than 38 per cent.

Since the organization of the defendant the American Tobacco Company and down to the time of the institution of this suit, the increase in tobacco, cigar and cigarette factories in this country has been notable. In 1891 the number of tobacco factories in the United States was 1,021. In 1907 it was 3,600, engaged in the manufacture of smoking and plug tobaccos. In 1890 there were 23,000 manufacturers of cigarettes and cigars, and in 1907 26,000.

The record does not show either that the defendants or any of them, have sought to prevent their competitors from securing their supplies of leaf tobacco or

any other supplies; nor that the defendant companies which are engaged in the supply business have ever refused to sell to competing manufacturers upon the same terms to which they sell to their fellow defendants.

The record shows affirmatively:

1. That all of the defendants sell their products openly in the market to competitors of their fellow defendants.

2. That the jobbers to whom the different defendants make special allowances deal in the goods of competitors of the defendants and receive special allowance from some of the latter.

3. That none of the defendants require their customers not to buy from competitors.

4. That the Continental Tobacco Company actually sold plants to competitors.

5. That the defendants have made no effort to purchase the plants of great and successful competitors such as Block Bros., Pepper, Schinasi.

6. That a large part of the customers of the American Tobacco Company do not deal at all in the product of the American Cigar Company.

7. That competition now exists in every branch of the business in which any of the defendants are engaged.

8. That dealers and consumers of tobacco products can fill their requirements without recourse to any of the defendants.

9. That the business of the defendants has in no way interfered with the prosperity of their competitors and that no complaint by competitors has been made to that effect, but that all competitors of the defendant have shared with the defendants the prosperous conditions of the business.

10. That the United Cigar Stores Company handles almost as many of the cigarettes produced by the competitors of the American Tobacco Company as it does of the latter's product.

IV.

WHAT THE COURT BELOW SAYS OF THE FACTS.

The court below, by Circuit Judge Lacombe, summarizing the operations of the defendants, says:

"The record in this case does not indicate that there has been any increase in the price of tobacco products to the consumer. There is an absence of persuasive evidence that by unfair competition or improper practices independent dealers have been dragooned into giving up their individual enterprises and selling out to the principal defendant. (P. 702.)

During the existence of The American Tobacco Company, new enterprises have been started, some with small capital in competition with it and have thriven. The price of leaf tobacco, the raw material, except for one brief period of abnormal conditions, has steadily increased until it has nearly doubled, while at the same time 150,000 additional acres have been devoted to tobacco crops and the consumption of the leaf has greatly increased. Through the enterprise of defendant, and at large expense, new markets for American tobacco have been opened or developed in India, China and elsewhere." (P. 703.)

Judge Noyes, agreeing with Judge Lacombe that the record is "remarkably free from instances of coercion and oppression," (p. 720) added:

"It may be that now, in applying the second section of the statute, performance, as well as power of performance, should be considered; that the elements of oppression and coercion should be shown to exist,

to establish an unlawful monopoly. And if these elements are to be considered, they are not sufficiently presented upon this record. It is not shown that the defendants have reduced prices to growers, nor that they have raised prices to consumers. The instances of coercion which are shown appear rather as incidental to the development of a great business than as indicative of a policy of oppression." (P. 722.)

Judge Ward, commenting on the facts, says:

"The purpose of the combinations was not to restrain trade or prevent competition, although competition was incidentally prevented, but, by intelligent economies, to increase the volume and the profits of the business in which the parties were engaged. No agreements were entered into, as in many of the decided cases, that operated directly on interstate commerce through common carriers by maintaining rates or preventing competition like U. S. v. Trans. Mo. Freight Assn., 166 U. S. 290; 17 Sup. Ct. 540; 41 L. Ed. 1007; U. S. v. Jt. Traffic Assn., 171 U. S. 505; 19 Sup. Ct. 25; 43 L. Ed. 259; Northern Securities Co. v. U. S., 193 U. S. 197; 24 Sup. Ct. 436; 48 L. Ed. 679; or which limited output of manufacturers or regulated the prices at or the territory within which their output should be sold throughout the United States, as in Addyston Pipe & Steel Co. v. United States, 175 U. S. 211; 20 Sup. St. 96; 44 L. Ed. 136; Montague & Co. v. Lowrey, 193 U. S. 38; 24 Sup. Ct. 307; 48 L. Ed. 608, and Swift & Co. v. U. S., 196 U. S. 375; 25 Sup. Ct. 276; 49 L. Ed. 518, or which sought to prevent any interstate commerce at all in the goods in question, as in Loewe v. Lawlor, 208 U. S. 274; 28 Sup. Ct. 301; 52 L. Ed. 488." (P. 726.)

* * * * * * *

"A perusal of the record satisfies me that their purposes and conduct were not illegal or oppressive but that they strove, as every business man strives, to increase their business, and that their great success is a natural growth resulting from industry, intelligence and economy." (P. 728.)

V.

THE ISSUE.

Judge Lacombe, speaking for himself and for the court below says, referring to the facts and to his summary of the consequences of the facts:

"*But all this is immaterial. Each one of these purchases of existing concerns, complained of in the petition was a contract and combination in restraint of a competition existing when it was entered into and that is sufficient to bring it within the ban of this drastic statute.*" (P. 703.)

Given the facts as stated, this proposition of Judge Lacombe implicitly formulates the issues, viz.:

Do these facts as a whole illustrate and constitute a series of restraints of trade under the Act?

Does the business of each of the defendants constitute monopolizing under the Act?

Does the business of the defendants as an aggregate or a group constitute restraint of trade or monopolizing under the Act?

VI.

THE STATUTE.

It is needless here to repeat the statute in its entirety. It is necessary, nevertheless, for the purposes of the argument, to summarize it.

Section 1: (a) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

(b) Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, etc.

Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor, etc.

Section 3 is negligible for the purposes of this discussion.

Section 4 vests the several Circuit Courts of the United States with jurisdiction to prevent and restrain the violation of the act.

The duty of instituting proceedings is imposed upon the several district attorneys of the United States "under the direction of the Attorney-General."

The noteworthy feature of this section is that the right and duty of setting the law in motion for the purpose of preventing and restraining violations of the Act rests wholly with the government and is wholly

within the direction of the Attorney-General. This feature of the Act, as will be seen hereafter, calls for the closest attention of the court when read in connection with the first and second sections, and particularly in view of the government's contentions, first: as to the construction of the Act; and, second: as to the measure of its duty and performance once it has set the law in motion under this section.

Section 5 is negligible.

Section 6 provides for the forfeiture to the United States of "any property owned under any contract or by any combination, or pursuant to any conspiracy, (and being the subject thereof) mentioned in section 1 of this act and being in the course of transportation," etc.

The power granted the government under this section is such that if the Act be construed as claimed by the government and it be possible that it should have a retroactive effect, then the result would be to render it unconstitutional as a violation of rights of property and of contract, and so the consideration of this section is important in determining first, the meaning, and second, validity of the act.

Section 7 may be regarded as negligible for the purposes of this case.

Section 8 provides that the word "person," or "persons," wherever used in the Act shall be deemed to include corporations, associations, etc.

The questions of law are two, growing out of the distinction between the construction of the statute and the validity of the statute, a distinction which has been uniformly recognized by this court (Chief Justice Fuller, 147 U. S. 369).

If we are to accept the construction as given by the court below, then we should have to discuss the validity of the Act as so construed.

If we are not to accept the construction of the court below the question then becomes a single one as to whether the real construction is such as not to render the statute obnoxious to the Constitution. We shall here pursue the latter course.

The question of the validity of the statute as the same is now construed by the court below has never been passed on by this court.

VII.

THE CONSTRUCTION OF THE STATUTE AS GIVEN BY THE COURT BELOW (164 *FED.*) *AND BY THE COURT FOR THE EIGHTH CIRCUIT IN U. S.* v. *STANDARD OIL CO.* (173 FED.).

A. *Tobacco Co. Case.*

Quoting section 1 of the act, Judge Lacombe says:

"That declaration, ambiguous when enacted, is, * * * no longer open to construction in the inferior federal courts. Disregarding various dicta and following the several propositions which have been approved by successive majorities of the Supreme Court, this language is to be construed as prohibiting *any* contract or combination whose direct effect is to prevent the *free play of competition* and thus *tend to deprive the country of the services of any number of independent dealers, however small.* As thus construed the statute is revolutionary. By this it is not intended to imply that the construction is incorrect." (164 Fed. 701.) (The italics are ours.)

"It would not be surprising to find that Congress had responded to what seemed to be the wishes of a large part, if not the majority, of the community, and that *it intended to secure such competition against the operation of natural laws.*" (164 Fed. 701.)

"*Every aggregation* of individuals or corporations, formerly independent, immediately upon its formation, *terminates an existing competition,* whether or not some other competition may subsequently arise. *The act as above construed prohibits every contract or combination in restraint of competition. Size is not made the test:* two individuals who have been driving rival express wagons, etc." (164 Fed. 702.)

JUDGE COXE says:

"The act is not limited to unreasonable restraints but embraces all direct restraints.

"The natural effect of competition is to increase commerce and an agreement whose direct effect is to prevent this free play of competition restrains trade and commerce. * * * It is only essential to show that by its *necessary* operation it *tends* to restrain interstate or international trade or commerce or *tends* to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition." (P. 707.)

JUDGE NOYES says:

"In determining whether a combination, within the meaning of the statute, is shown, these propositions must be accepted as established by the decisions of the Supreme Court:

"(1) *Every combination* in restraint of interstate commerce, *whether reasonable or unreasonable,* is in violation of the statute. The present state of the law is thus summarized in the very recent case of *Shawnee Compress Co.* v. *Anderson,* 209 U. S. 423, 434: 'and it has been decided that not only unreasonable, but all direct, restraint of trade is prohibited, the law being thereby distinguished from the common law.'

"(2) Every combination *restraining competition* in interstate trade is a combination in restraint of interstate commerce. As said by Mr. Justice Harlan in the *Northern Securities Case,* 193 U. S. 197, 337: 'To destroy or restrict free competition in interstate commerce was to restrain such commerce.'

"And as stated by the court in *National Cotton Oil Co.* v. *Texas,* 197 U. S. 115, 129, in speaking of the purpose of the state and federal statutes against combination: 'According to them, *competition, not combination, should be the law of trade.* If there is evil in this it should be accepted as less than that which may result from the unification of interests, and the power which unification gives.'

"This construction of the statute confines the duty of this court in applying it within very narrow limits. We have only to inquire *whether the evidence shows a*

combination restraining competition. There is no necessity for going further. Other inquiries are immaterial." (P. 717.)

"The *extent* to which they (defendants) have exercised their power is *immaterial.* The question presented by the present inquiry *is one of the existence of power, not its exercise.*" (P. 720.)

B. *The Standard Oil Case.*

"The test of the legality of a contract or combination under this act is its direct and necessary effect upon *competition* in interstate or international commerce. If the *necessary effect* of a *contract, combination,* or conspiracy is to stifle, or directly and substantially *to restrict,* free competition in commerce among the states or with foreign nations, it is a contract, combination, or conspiracy in restraint of that trade, and it violates this law. The parties to it are presumed to intend the inevitable result of their acts, and *neither their actual intent,* nor the *reasonableness* of the restraint imposed may withdraw it from the denunciation of the statute." (U. S. v. Standard Oil Co., 173 Fed. 179.)

"The purpose of this statute was to keep the rates of transportation and *the prices of articles* in interstate and international commerce open to *free competition. Any contract* or combination of two or more parties, whereby the control of such rates or prices is taken from separate *competitors* in that trade and vested in a person or an association of persons, *necessarily restricts competition and restrains* that commerce." (P. 184.)

"The purpose of the act of July 2, 1890, was to prevent the stifling and the substantial *restriction of competition* in interstate and international commerce. *The test* under that act of the legality of a combination or conspiracy is its direct and necessary *effect upon* such *competition.* If its necessary effect is but incidentally or indirectly to restrict competition, while

its chief result is to foster the trade and increase the business of those who make and operate it, it is not violative of this law." (Id., p. 188.)

"Undoubtedly every person engaged in interstate commerce necessarily attempts to draw to himself, to the exclusion of others, and thereby to monopolize, a part of that trade. Every sale and every transportation of an article which is the subject of interstate commerce evidences a successful attempt to monopolize that trade or commerce which concerns that sale or transportation. If the second section of the act prohibits every attempt to monopolize any part of interstate commerce, it forbids all competition therein, and defeats the only purpose of the law; for there can be no competition, unless each competitor is permitted to attempt to draw to himself, and thereby to monopolize, some part of the commerce. This is not, it cannot be, the proper interpretation of this section. It must be so construed as to abate the mischief it was passed to destroy and to promote the remedy it provided. It was enacted, not to stifle, but to foster, competition, and its true construction is that, while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts. Whitwell v. Continental Tobacco Co., 60 C. C. A. 290, 298; 125 Fed. 454, 464; 64 L. R. A. 689; Phillips v. Iola Portland Cement Company, 61 C. C. A. 19, 20; 125 Fed. 593, 594." (Id. 191.)

JUDGE HOOK says:

"The language employed in the act is as comprehensive as the power of Congress in the premises, and the purpose was not to hamper business fairly conducted, but adequately to promote the common interest in freedom of competition and to remove improper obstacles from the channels of commerce that all may enter and enjoy them. The wisdom of a law lies in its spirit as well as in its letter, and unless they go together in its construction and application justice goes astray. (P. 194.)

"Manifestly this (second) section is quite distinct from the first, and was not intended to cover precisely the same ground. To say otherwise would be to impute to Congress the doing of the unnecessary and useless. Though the natural tendency of a combination in restraint of trade declared illegal by section 1 may be and generally is toward monopoly denounced by section 2, and may even accomplish it, yet the scope of the latter section is far broader and was designed to extend also to monopolies secured by other means than by contracts, combinations and conspiracies in restraint of trade, which, as those terms necessarily imply, require concert between two or more persons or corporations. One person or corporation may offend against the second section by monopolizing, but the first section contemplates conduct of two or more. A cursory reading of the act shows this. That it was the intention of Congress to condemn monopolies, not based on illegal combinations among several, but secured by single persons, natural or artificial, by other means, also appears from the history of the legislation." (Id. 195.)

"What is a monopoly in contravention of the statute? I would not say that every person who strives to gain as much as he can of the commerce in a commodity is thereby attempting to monopolize that commerce, within the meaning of the term as it is employed in legislative acts and understood in the courts. *Magnitude of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize.* To offend the act the monopoly must have been secured by methods contrary to public policy as expressed in the statutes or in the common law. The wrongful element in a monopoly under the act is not necessarily the violation of some penal statute, but may consist of other acts or conduct which the law condemns and the benefit of which, if sought in a civil court of justice, could not be obtained. * * * * Congress did not intend to impede legitimate commercial activity, nor put a limit to its fruits. The genius and industry of man, when kept to ethical standards still have full play, and what he achieves is his; and this applies as well to a corporation, in which

the energies of many are concentrated under the authority of law in a single organization.

"*Success and magnitude of business,* the rewards of fair and honorable endeavor, *were not among the evils* which threatened the public welfare and attracted the attention of Congress. But when they have been attained by wrongful or unlawful methods, and competition has been crippled or destroyed, the elements of monopoly are present." (Id., pp. 195, 196.)

The divergence of view between the two Circuit Courts is thus made apparent.

VIII.

THE DECISIONS OF THIS COURT WILL NOT HAVE TO BE OVERRULED TO SUSTAIN THE CONTENTION OF THE DEFENDANTS.

We insist that the court is not required to adopt the theory of the statute which the court below has applied in the present case because of any actual determination or determinations of its own. The proof of this assertion can only be established by a reference to the jurisprudence itself, and by a clear statement not of what the several members of the court have *said* but what the court *qua* court has *done*.

Taking up the cases in chronological order and confining ourselves precisely to the statement of *what the court has done rather than what its members have said* we find the following to be the facts.

1895 — *U. S. v. E. C. Knight Co.*, 156 *U. S.* 1.

The court found that the questions raised in this case were the following:

First: Whether manufacture was interstate commerce?

Second: Whether acquisition by one corporation of the shares of stock of another corporation was interstate commerce?

It decided both of these propositions in the negative, Messrs. Fuller, Field, Gray, Brown, Brewer, Jackson, Shiras and White being in agreement, and Mr. Justice Harlan dissenting.

Inasmuch as this case calls for thorough analysis later on, we pass it without further remark except to add that, in view of the issues to be determined and the actual determination of those issues, the court was not called upon to define either restraint of trade or monopoly, and any such definition which may be found in the opinion of the court or the dissenting opinion is purely *obiter.*

1897 — *U. S. v. The Trans-Missouri Freight Association,* 166 *U. S.* 290.

Here the defendant had entered into an agreement to establish and maintain " reasonable rates, rules and regulations on all freight traffic," etc.

The court held by Peckham, J., delivering the opinion, and Fuller, C. J., Harlan, Brewer and Brown, JJ., concurring:

First: That the traffic in question was interstate commerce;

Second: That interstate commerce conducted by railway corporations fell within the provisions of the act. That railroads are instruments of commerce, and their business is commerce itself;

Third: That the particular agreement was a restraint of trade of the class denounced by the Act.

The agreement in question was one which would have been unenforceable at common law, and the finding of the court amounts to no more than this, viz., that contracts in restraint of trade not enforceable at common law, were made positively unlawful by the statute, and therefore subject to injunction.

The opinion of Mr. Justice Peckham appeared inconclusive to Messrs. White, Field, Gray and Shiras. Mr. Justice Peckham's method of reaching his conclusion is, for the present purpose, immaterial. The conclusions alone were the act of the court, and even then of the court by a majority of one only.

1898 — *U. S. v. Joint Traffic Association,* 171 *U. S.* 505.

The defendants in this case sought by a new form of agreement to accomplish the purposes sought to be accomplished in the Trans-Missouri case. The court found, by the same vote as in the Trans-Missouri case, that the ultimate facts were not distinguishable in the two cases; treated the argument upon the case as a reargument of the Trans-Missouri case; found that the conclusions reached in the latter were correct, and affirmed them.

In this case for the first time the constitutional question was raised, and it was held that the act of 1890 *as applied in that case* was not obnoxious to the Fifth Amendment which provides that

" no person shall be * * * deprived of life, liberty or property without due process of law."

The entire court in this case was in agreement upon two principles:

First: That *commerce and competition are not identical;*

Second: That the word " liberty " in the Constitution includes the right to contract.

In respect of the facts of the case the entire court was in agreement to the effect that the rates fixed were reasonable. The majority of the court, however, held:

(a) that the reasonableness of the rates was not a good defense; and

(b) notwithstanding the fact that competition and commerce are not identical " the agreement affects interstate commerce by destroying competition and *by maintaining rates above what competition might* produce." (Italics ours.)

1898 — *Hopkins v. United States,* 171 *U. S.* 578.
Anderson v. United States, 171 *U. S.* 604.

The Hopkins case was decided entirely upon the facts, which were held not to constitute proof of an

act prohibited by the statute, as having no direct and immediate effect upon interstate commerce. The only principle of law determined in this case was that acts or agreements complained of as obnoxious to the statute must directly and immediately affect interstate commerce.

In this conclusion the court was a unit with the exception of Mr. Justice Harlan dissenting, Mr. Justice McKenna taking no part.

The case is noteworthy as containing a rule of construction agreed in by all of the sitting members except Mr. Justice Harlan, which was as follows:

" The act * * * *must have a reasonable construction or* there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements." (P. 600.)

In the *Anderson case* the court held:

There was no feature of monopoly in the whole transaction; (p. 614)

that the agreement * * * was not one in restraint of trade, nor was there any combination to monopolize or to attempt to monopolize such trade within the meaning of the Act; (p. 615)

and that the court was therefore not called upon to decide whether defendants were or were not engaged in interstate commerce. (P. 615.)

In the decision in this case, as in the preceding one, Mr. Justice McKenna took no part, Mr. Justice Harlan dissented, and the opinion of the court was that of the remaining seven members.

1899 — *Addyston Pipe & Steel Co. v. U. S.*, 175 *U. S.* 221.

Here the court held that the agreement in question

" in its direct and immediate effect forecloses all competition and enhances * * * price." (P. 246.)

The facts show clearly that the agreement would not have been enforceable at common law and that, assuming that the words " restraint of trade " in the statute had no other meaning than the common-law meaning, the agreement by virtue of the statute was not only unenforceable but had, by virtue of the statute, become positively unlawful and therefore subject to the intervention of the government for the purpose of enjoining its performance.

The question of the constitutionality of the act was again passed upon but only so far as concerned the right of Congress to prohibit the particular kind or class of agreement complained of. In this case the court was a unit.

Mr. Justice Peckham, who wrote the opinion, distinguished the case from that of *U. S.* v. *E. C. Knight Co.* There was no necessity for such attempted distinction, and the distinction as made is only of value as an explanation by a justice who joined the majority in deciding the *Knight case*, of the mental attitude of such majority at the time of such decision, and of the scope and real meaning of the particular case.

1904 — *Montague v. Lowry*, 193 *U. S.* 38.

This was the first case to which the government was not a party. It was not brought under either of the first two sections but under the seventh section of the act. The facts showed clearly that the agreement in question was one which would have been unenforceable at common law and having been made unlawful by the statute, the statute at the same time having authorized suits by parties injured, the plaintiff was in his right. The agreement was held not only to be unreasonable but to have actually restrained trade and actually to have enhanced prices.

The entire court concurred in the conclusion.

1904 — *Northern Securities Co. v. United States,* 193 *U. S.* 197.

Inasmuch as this case requires fuller analysis hereafter it is needless to dwell upon its peculiarities at this time.

All that the case can possibly be held to have established is that the law does prohibit unreasonable restraints and that the restraint complained of was such. It is authoritative upon no other point.

The case is distinguished from the case at bar by the fact that the actual nature of the transaction showed the defendant there " not as a real purchaser or absolute owner, but simply a custodian;" and by the other fact that it referred to railroad companies and not to manufacturers, individual or corporate.

1905 — *Harriman v. United States,* 197 *U. S.* 244.

This case is negligible, inasmuch as it dealt only with the *sequelæ* of the *Northern Securities case.*

1905 — *Swift v. United States,* 196 *U. S.* 375.

The principal finding in this case was that it was immaterial that the combination " embraces restraint and monopoly of trade within a single state " when directed against commerce among the States, which latter it found to be the case. The attempt had been made to bring this case within the rule of the Knight case. The court found that it was not so, because the restraint complained of was direct and not accidental, secondary or remote.

1905 — *Board of Trade of Chicago v. Christie Grain & Stock Company* (198 *U. S.* 236).

1908 — *Loewe v. Lawlor,* 208 *U. S.* 274.

In this case the opinion was written by the Chief Justice and was the opinion of the entire court. It is one of the cases to which the government was not a party and therefore in the same class as *Montague* v. *Lowry,* the *Board of Trade, etc.,* v. *Christie & Co.,* and the later *Wall Paper Co.* and *Banana Co. cases.*

It held that the Act of 1890 has a broader application than the prohibition of restraints of trade which were unlawful at common law and includes certain acts which were conspiracies at common law and positively unlawful. It was the first case in which the court as such agreed unanimously upon this principle, and it must therefore be adopted as final unless the determination reached therein be reconsidered.

The Act was held to prohibit any conspiracy to obstruct the free flow of commerce between the States or to restrain in that regard the liberty of the trader to engage in business, and includes restraints of trade aimed at preventing third parties and strangers from engaging in interstate commerce, except upon the terms fixed by the conspiracy complained of.

The acts complained of were the unlawful results of a conspiracy to injure others whose interests the parties to the transaction believed to be adverse, and to that extent to infringe the rights of third parties. The facts of the case demonstrate that it is one in which the court would have been justified in exercising its equity powers quite without regard to the statute.

It has no relation to the construction given to the statute by the court below in the case at bar.

1909 — *Continental Wall Paper Co. v. Voight & Sons,* 212 *U. S.* 227.

American Banana Co. v. United Fruit Co., 213 *U. S.* 347.

In the *Wall Paper case* the question was raised by

way of defense to an action on account for merchandise sold and delivered to defendant. It was held that the agreement sued on was one that was in restraint of trade under the statute and which would have been in restraint of trade at common law, and the court declined to enforce the contract precisely as it would have been done had the Sherman Act not been passed. The court agreed on the result in this case. Two opinions were written. Justices Holmes, Brewer, White and Peckham thought that the question should stand on its own merits and not be considered as part of an illegal scheme. Mr. Justice Brewer here delivered a dissenting opinion in which he held that the remedies provided by the Sherman Act were exclusive.

The Banana Co. case holds that the law of 1890 does not extend to acts done in foreign countries, even though done by citizens of the United States and injuriously affecting other citizens of the United States. It has no relevancy to the theory of construction adopted by the court below.

The decisions actually reached in each class of cases and in each case within each class are such as to leave the construction of the court below wholly without justification as a statement of the actual determinations of this court; and this court is left to determine whether the court below is justified in attributing to it the reduction of the statute to an absurdity.

The actual conclusions of this court are these and these only:

1. That manufacture is not commerce and the acquisition by one manufacturer of the plant of another, directly or by the acquisition of capital stock of another does not constitute nor affect interstate commerce.

2. That the Act applies to unreasonable restraints in either of the classes described by Holmes, J., in the *Northern Securities case* and by the court in *the Baltimore Gas Co. case.* (Hereafter referred to.)

3. That the restraint complained of must be proximate and direct.

4. That the act applies to conspiracies unlawfully and illegally to injure another in his business or to restrict his freedom of the market.

5. That the intent of a combination must be proven or must be implicit in the plan as the same is disclosed by the agreement.

6. That railroad corporations are under legal duty of competing, and are within the act.

7. That as thus construed and applied the act is constitutional.

All questions of construction and constitutionality except as implied in these seven propositions are still open.

Our issue with the court below is that it has not properly stated the actual determination of this court, and is in error in holding that this court has declared the law to be as the Circuit Court states it.

We deny

1. that it is the intent of the law, or that this court as a court has ever finally found, that the Act of 1890 makes the cessation or natural and rightful limitation of *competition* unlawful, or

2. that it has any reference to the "*tendency*" of contracts or agreements, but only to contracts or agreements as they are self-interpretative or interpreted by the acts done under them; or

3. that it is legislation designed to regulate "*prices*"; or

4. that it prohibits the existence of economic groups merely because of the *power* of such groups; or

5. that it affects the methods of acquiring or holding *property*.

We contend that

(a) If these purposes are to be read into the Act,

it is as obnoxious to the Constitution as if they were declared in the Act;

(b) If this court holds that the act as construed is constitutional as a prohibition of *unreasonable* restraints of trade and monopolies — that the facts in this case nevertheless develop neither restraint of trade nor monopoly except in that measure which would lead, if the law were equally and fully applied not only to an economical but to a political revolution which, even if within its power, Congress never intended by the Act of 1890, and which intention cannot be inferred by this court so long as Congress does not *expressly* declare it in unmistakable terms.

IX.

THE METHOD PURSUED BY THE COURT IN THE KNIGHT CASE WAS THE CORRECT METHOD, AND THE PRINCIPLES THERE ANNOUNCED MUST CONTROL IN THE DETERMINATION OF THE CASE AT BAR.

We must begin the consideration of the *Knight case,* in which eight out of nine members of this court were in agreement, by first determining precisely what was *done* in that case before we consider what was *said* in it.

The contract merely concerned the purchase of stock in the refineries and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies. The court held, that *the right to acquire* was not within the commerce clause.

This, with the further proposition that manufacture precedes commerce, and that commerce only begins when the manufactured goods are ready for the market, were the determining motives in the decision, and as we have already insisted, and now reinsist, the court has as yet never receded from these propositions.

"Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce. * * * If it be held that the term includes the regulation of all such manufactures as

are intended to be the subject of commercial transactions in the future it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining — in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? " (Kidd v. Pierson, 128 U. S., pp. 1, 23.)

Beginning by the natural method of an attempt to discover the historical meaning of words heretofore used both technically and colloquially, the court in the *Knight case* quotes in full the definition given by Lord Coke in his Comments upon the Statute of 21 Jac. I., chap. 3 (see Appendix), and then, after stating the contention of counsel with regard to the real meaning of this definition, strikes at the root of the matter by pointing out that the monopoly and restraint denounced by the Act of 1890 are not monopoly and restraint of trade within a State, but

" are either monopoly and restraint of interstate and international trade, or commerce ",

while the conclusion which the court was asked to assume on the record in that case was

" that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessity of life."

Then proceeding a step further and anticipating its conclusion, the court properly said in view of that conclusion that it was needless to discuss whether the dominant corporation was a combination to monopolize; whether " aggregations of capital may reduce prices;" whether theoretically others were left free to go into the business; and whether the fact that those who sold their stock in other corporations " might set up again for themselves."

And then the fundamental question was stated:

"Whether, conceding that the existence of a monopoly in manufacture was established by the evidence, monopoly can be suppressed under the Act of Congress in the mode attempted by this bill."

And for the purpose of eliminating the question of the police power of the States from the controversy the court admitted that when the power of

private individuals * * * becomes a matter of such public interest and importance as to create a common burden or charge upon the citizens * * * and by means of which a tribute may be exacted from the community,"

the business carried on by such private individuals is subject to regulation by State legislative power, but that within the State this power is exclusive, precisely as in interstate commerce the power of Congress is exclusive, and that in both cases the power was not confined and could not be confined to necessities of life because

"*the power to regulate commerce is the power to prescribe the rule by which commerce shall be governed and is a power independent of the power to suppress monopoly.*"

The court then touched the high point in the case, i. e.,

"It is vital that the independence of the commercial power and of the police power, and the de-limitation between them, however sometimes perplexing, should always be recognized and observed."

Carefully following this line of reasoning from the *terminus a quo*, it then considered the government's proposition

"that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate commerce may be ultimately affected,"

and replied that such was not the case inasmuch as a article

"manufactured for export to another state does no of itself make it an article of interstate commerce."

This proposition was undeniable and has never ye been denied by this court. It certainly was not denied in the *Northern Securities case,* which involved no such question, nor has it been denied in any of the other cases of either class, *i. e.*, the cases in which the court has held that the specific agreement complained of was on its face an agreement in restraint of trade or in the class of cases in which it was held that the things complained of were not obnoxious to the statute. Then, considering the nature of manufacture in its relation to commerce, we have the proposition of Mr. Justice Lamar in *Kidd* v. *Pierson*, as above quoted, adopted and approved as the proposition of the court.

Such being the difference between commerce and manufacture there was no necessity for the court to discuss what would be the result were it to be held otherwise. Nevertheless, inasmuch as the meaning of any statute may be properly tested by a reference to its consequences and by the question: Is it possible that such consequences were intended by the Congress? the court pointed out that if the government's contention were right *at* all then it must be right *in* all, and meant nothing less than that Congress was invested, to the exclusion of the States, with power to regulate

"every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital

terests. * * * Even in the exercise of the power intended for, Congress would be confined to the regulation not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer would contemplate an interstate market."

The court held in terms that by the Act of 1890

"Congress did not attempt * * * to assert the power to deal with monopoly directly as such; or
"to limit and restrict the rights of corporations created by the states or the citizens of the states in the acquisition, control or ~~justification~~ disposition of property; or
"to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or
"to make criminal the acts of persons in the acquisition and control of property which the states of their residence sanctioned or permitted."

Now, it may be confidently asserted that no one of these propositions has since been denied by this court. It is true that the second proposition is said to have been overruled in the *Northern Securities case*. We believe the contention to be without justification. Meantime, the correctness of the propositions thus asserted is involved in the case at bar and is challenged as to each proposition by the government.

And so the court finally reached its conclusion

"that the contracts and acts of the defendant relate exclusively to *acquisition* * * * and bear no direct relation to commerce;
"that an attempt to monopolize or the actual monopoly of *manufacture* is not an attempt to monopolize commerce;
"that the *subject-matter of the sale* was shares of manufacturing stock and the relief sought the suppression of the alleged monopoly of manufacture;"

while the act of Congress only authorized the prevention of violations of the act in respect of interstate or international trade or commerce.

Assuming the Act to mean only what it said, admitting that Congress had the power to prohibit restraints of trade and monopoly in interstate commerce the conclusion was naturally and simply that as the acts complained of were not acts of trade or commerce the statute had no application, and there being no necessity for the further construction of the statute the court did not construe it for the purpose of determining the meaning either of restraint of trade or of monopolizing as used in it.

Those questions only arise in later cases.

X.

THE DECISION IN THE NORTHERN SECURITIES CASE IS NOT RES ADJUDICATA SO FAR AS CONCERNS THE MEANING OF THE ACT IN ITS APPLICATION TO THE CASE AT BAR.

The decision is valid as to the particular case and nothing more, and is, therefore, valid upon no ground larger or wider than those stated by Mr. Justice Brewer. It is relevant to a case in which it is found not only that the restraint complained of is unreasonable but that there has been an agreement designed for the purpose of evading the statute, or in violation of the terms of the charters of the companies which it is sought virtually to consolidate by such evasive agreement, and to no other.

Mr. Justice Brewer, conceiving an intermediate course, and reaching his conclusion by methods of his own, which conclusion, so far as concerned the mere question of the entry of the particular decree in the case, gave the Government a majority of one, was of the opinion;—

1. That the Act did not apply to all restraints of trade whether reasonable or unreasonable.

2. That "Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had held were reasonable and ought to be upheld."

3. That " the general language of the Act is limited by the power which each individual has to manage his own property and determine the place and manner of its investment."

4. That " freedom of action in these respects is among the inalienable rights of every citizen."

5. That the right of acquisition by a citizen of shares in a railroad corporation was not denied by the Sherman Act because it " might tend to vest in him through that ownership a control over both companies."

Nothing remains, therefore, but to ask what propositions he declared affirmatively as being to his mind the determining factors in the case. There were two:

1. That the facts in the case made it impossible for him to believe that the combination was a reasonable or lawful restraint of trade; and

2. That it was not even essential to pass upon the question of reasonableness in view of the fact that it was admitted that the Northern Securities Company was a merging of control, and that such merger was specifically prohibited by the State which created one of the companies. That therefore the purpose and policy of the State would be enforced by the entry of the decree, or, in a word, as he finally concludes that it was " an unreasonable combination * * * in conflict with state law and within the letter and spirit of the statute and the power of Congress."

It will be noticed that for these reasons and for no others whatever, he concurred in the judgment of affirmance.

XI.

THE STATE OF THE LAW AT THE TIME OF THE PASSAGE OF THE ACT.

This is what Lord Coke called the "lock and key which sets open the window of the statute."

Legislation is, with one exception, the highest expression of power. The higher expression is that of the power of construction. It is the power involved in this duty which, by authorizing the court to discover the legislative purpose, authorizes it in fact to be the arbiter of what the law itself actually is. It is thus that the court makes the law, and it is this power of making the law which enables the court to become the instrument of both order and progress, and invests our legal system with that element of vitality and growth which has made it the characteristic of English and American law; it is thus that here the legal order at all times more closely harmonizes with the sociological and economical order than in those countries where deliberate effort has been made to impair judicial interpretation as an instrument for the growth of the law.

As the function of construction precedes and is higher than that of application, and particularly inasmuch as in the present case it is precisely this "higher duty" which is involved, our first thought should be as to those rules of construction which constitute part of the alphabet of juridical science, because if there

be any scientific aspect to the law and any such aspect with regard to which there is no doubt, it is the rules of hermeneutics.

Now the first of these rules is that the court will always before construing a statute which appears to introduce a new element into the law, turn to and make precise the state of the law at the time of the passage of the statute, for the purpose of determining precisely the place of the statute in the developmental history of the *corpus juris,* and this is done, *ex necessitate,* before applying universally accepted rules of construction and, therefore, as well, before formulating those particular rules of construction which are about to be applied in any given case.

We conceive that much, if not most, of the errors and confusion which exist with regard to the intention of Congress and to the purpose and meaning of the Act of 1890, are due to the failure properly to apprehend the state of the law at the time of the passage of the Act.

The correct determination of this question is made imperative because of the claim of the government.

The first point in the government's brief contains an outline of the case. The second point, which is predicated upon the identical point of view that we now present, viz., the necessity as a point of departure of studying the antecedent state of the law, is as follows:

"Contracts, combinations and monopolies which directly and materially hindered or obstructed interstate or foreign commerce were *unlawful* prior to the Act of July 2, 1890." (Italics are ours.)

It is true that the government takes this position, not as an aid to construction, but for the purpose of showing that the business of the American Tobacco Company was unlawful prior to 1890 quite without reference to the Sherman Act, and "that present con-

ditions are not the mere orderly outcome of an enterprise rightfully undertaken." But if the act means what the government now contends it is quite immaterial to ask what the common law was. Otherwise it is of the utmost importance to know what the common law was, and whether the act merely declared it and provided new penalties for its infringement, or whether the purpose of Congress was to modify the common law with regard to the class of prohibited acts; to declare an enlarged class of acts to be criminal; and also to lay down a new principle of criminality.

We do not contend that the great multitude of interstate commerce transactions were "freed from the burden created by the common law * * * and * * * subject to no rule except that to be found in the statutes of Congress" but it is imperative that we should know just what those burdens were.

It does not follow that because there were common-law rules those rules were what the government now claims them to have been, and we make no doubt "that the principles of common law are operative upon all interstate commercial transactions." But that admission involves no admission as to what the common law itself was, although it does involve the necessity for an accurate determination of what it was.

Prior to 1890 there was but one important State statute on monopolies and restraint of trade, viz., that of Texas. That statute, as we shall point out, is very different in character from the Sherman Act and one which the Sherman Act was careful not to follow. The civil branch of the common law in respect of these two titles prevailed in all of the States and we believe prevailed equally in our Federal jurisprudence so far as concerned interstate commerce.

Neither a State nor an individual had the right to invoke the equity power of the court in respect of such matters; but *conspiracies to injure* third parties in re-

spect of their person, their properties or their contractual rights had long been crimes, i. e., violations of the right of the State, and, as torts, had always been recognized as violations of the right of the parties injured. As a consequence such conspiracies were punishable by indictment and conviction, in the State but not in the Federal courts.

The authors of such conspiracies being guilty of tort, were actionable for damages, and the performance of the purpose of the conspiracy was, as such, subject to judicial restraint. The state of the common law in this country was identical with the common law in England as the same was declared in the leading case of *Mogul S. S. Co.* v. *McGregor* in 1891. Contracts in restraint of trade (other than conspiracies to injure) were *illegal* in the sense that they were unenforceable, but they were not *unlawful* in the sense that they were prohibited. As Lord Chancellor Halsbury said in that case, they were not unlawful as contrary to law and had never been held to be unlawful in that sense. They were merely invalid and unenforceable. This was equally the law in all of our States, and it was also Federal law at the time of the passage of the Sherman Act. In an action upon a contract either for specific performance or for damages, it has always been within the power of the court to ask whether the contract sued upon is against public policy or good morals, and if the court believes it to be against public policy for any reason, ethical, juridical or economic, the court as a court of conscience refuses to interfere, and if a

"business were of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce and sustain contracts imposing such restraint."

The principle is thus clearly laid down in Schuster's valuable treatise on the *Principles of German Civil Law* (p. 80) as a universal principle of jurisprudence:

"*An act-in-the-law is a manifestation of the human will intended to create an effect recognized by law.* * * * An act-in-the-law which is inoperative from the beginning is called 'void' (*nichtig*); an act-in-the-law which remains operative unless impugned * * * is called 'voidable' (*anfechtbar*)."

But in neither case has any such an act ever been called "unlawful" in the sense of being prohibited and punishable as a crime.

At common law, contracts in restraint of trade, or tending to the creation of a monopoly, were not unlawful. They were not held to involve in any sense the idea of immorality, or criminality, or illegality. Thus, as Sir Frederick Pollock puts it:

"In common law the fact that an agreement is void, as being in restraint of trade, does not, without more, make it unlawful — that is to say, an indictable offense or an actionable wrong — either to enter into such an agreement or, if one thinks fit, to observe it."

In *Mogul S. S. Co.* v. *McGregor* (L. R. App. Cas., 1892, 25), in the House of Lords, the Lord Chancellor said:

"It is not denied, and cannot be even argued, that *prima facie* a trader in a free country in all matters 'not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice.'

* * * * * * * * *

"A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word 'unlawful' is not uncommonly, though I think somewhat inaccurately, understood. There are some contracts to which the

law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed."

The situation was even more clearly stated by Bowen, L. J., in the same case (L. R. 23 Q. B. D., 619, 620):

"Lastly, we are asked to hold the defendants' conference or association illegal, as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade are *not*, in my opinion, *illegal in any sense, except that the law will not enforce them.* It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in *Hilton* v. *Eckersley* (6 E. and B. 47) is, I think, not to be supported. *No action at common law will lie or ever has laid against any individual or individuals for entering into a contract merely because it is in restraint of trade.* * * * If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law."

Thus, from the point of view of the common law, certainly that of the English Common Law as late as 1892, the situation was this: that if the courts found the agreement to be injurious to the community as a whole, they would simply decline to be drawn into the controversy between the parties, either to enforce such contracts or to impose damages for their breach, merely leaving the parties as it found them.

The judicial reason for this — in the absence of a statute forbidding such agreements — is not far to

seek. Contract, as Anson has described it (page 2): "is that form of agreement which directly contemplates and creates an obligation." And (page 5): "Obligation is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another group of persons." "It is (page 7) a control exercisable by definite persons over definite persons for the purposes of definite acts or forbearances, reduceable to a money value."

The whole theory of the law of contract, is this: that "when a private person expresses his will with regard to his property, or his personal services, in such a way that the law annexes to the expression, the result willed, we have a juristic act of private law" (see Sohm's "Institutes," 2d ed., 216). If the law recognizes and enforces this voluntary act of the person, it constitutes a valid contract, or a valid will. But the law without condemning the act or the intention may simply refuse to give it expression.

Now, at common law, if an agreement were in restraint of trade, the law would not treat it as a contract at all, but merely as an agreement with no sufficient consideration and which involved no obligation. Consequently, such agreements were not described as being either right or wrong, as legal or illegal, as commendable or criminal, but simply as being void; that is to say, agreements of a character not involving an obligation which the law would enforce, or compel compensation for the breach of, but which were good in practice so long as the parties adhered to them.

The modern tendency of the general or common law — that is to say, law other than statutory law — in the United States, is clearly indicated in the case of the *Diamond Match Company* v. *Roeber,* which recognized a larger freedom of contract, a wider liberty to bargain, and materially broadened the narrow and medieval view as to what did constitute a restraint of trade.

The fundamental principle recognized in modern times, both in England and in this country, and one in keeping with our economic progress and the teaching of the economists was aptly stated by Sir G. Jessell, Master of the Rolls, in the case of the *Printing Company* v. *Sampson* (Law Reports, 19 Eq. 462), in a passage which has been so frequently quoted and approved in this country, as to have become classic, viz.:

"If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice."

Under the rule laid down in *Mitchell* v. *Reynolds,* which was decided as long ago as 1711, the test as to whether a restraint was a legal or illegal one, was whether it was partial or general. This seems to have continued to be the common law of this country as well as of England down to the time of the *Diamond Match Co.* v. *Roeber.* The principle in this latter case was approved in *Matthews v. The Associated Press* (136 N. Y. 33), a little later, where the court said:

"The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are, nevertheless, valid contracts and to be enforced; they do, however, now hold many contracts not open to the objection that they are in restraint of trade, which a few years back would have been voided on that sole ground, both here and in England."

The case of *Nordenfeldt* v. *Maxim-Nordenfeldt Co.,* the English House of Lords, in 1894 (Appeal Cases, 535) — as that case is summarized by the Supreme Court of the United States in the Trans-

Missouri case, and adopted as expressive of the common law — held that:

"The distinction between partial and general restraint was an incorrect criterion, but that whether a contract was invalid because in restraint of trade must depend upon whether, upon considering all of the circumstances, the contract was found to be reasonable or unreasonable. If reasonable, it was not a contract in restraint of trade, and, if unreasonable, it was. The decisions of the American courts substantially conform to both the development and ultimate results of the English cases."

That was as far as the law went. In other words, it was not to the effect that such contracts were unlawful in the sense of being prohibited, although they were commonly called illegal in the sense of being unenforceable, in precisely the same way in which contracts *contra bonos mores* are illegal in the sense of being unenforceable, with the consequence that the question was always one, not of general unlawfulness in respect of which the state might intervene, but of the enforceability of a particular contract concerning which the State through the courts would not intervene.

This court announced the foregoing principle in terms in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S., at 410, and in support thereof cited a number of cases which fully justify the statement of Mr. Justice Brewer that

"The decision in *Mitchell* v. *Reynolds* * * * is the foundation of the rule in relation to the *invalidity* of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances involved in it, the contract is, or is not, unreasonable."

And in support of this proposition this court quoted two English cases (*Mogul S. S. Co.* case not having then been decided), and took identically the same position which was to be reasserted by the English courts three years later in the *Mogul case,* between which dates, however, the Sherman Act became law. It must be remembered, moreover, that the restraint pleaded in *Gibbs* v. *Baltimore Gas Co.* was one of that historic type which involved the question as to how far an individual could, consistently with public policy, go out of both his right and duty of pursuing an occupation, and involved the principle, that a contract which is open to the objection that the country suffers loss because of one's agreement to go out of such occupation, is clearly against public policy, while, if as a matter of fact, the country suffers no such loss and the party making the agreement is not called upon to expatriate himself in order to follow the agreement, then if the contract be founded on a valid consideration, with a reasonable amount of benefit to the other party, it is free from objection and may be enforced.

Much confusion has ensued because of the failure to recognize the distinction between " unlawful " as " prohibited "; and " illegal " as " unenforceable "— in precisely the manner in which a contract without consideration or a contract against public policy is illegal but not unlawful.

The common law prescribed no rule of competition. It held merely that no one had a right absolutely to deprive the public of his services as a factor in the economic life of the community; that no one had a right to make a contract which might leave his family penniless and both them and him a burden on the State. This was the original motive and continued throughout to be the motive of the law, and the law was applied differently in respect of every case precisely as the facts of the case brought it within the motive, but the common law prescribed no rule of competition and no penalty for interfering with it.

On the other hand, as is clearly shown by Lord Halsbury and his associates in the *Mogul S. S. Co.* case, the law of competition is not a law of State but an economic law, and the common law did not in any way attempt to substitute itself for the economic law. Without going into any prolonged discussion of such cases as *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St. 173; *Arnot* v. *Pittston & E. Coal Co.*, 68 N. Y. 565; *Craft* v. *McConoughy*, 79 Ill. 346, it is only necessary to refer to the facts in each case, to show that the courts clearly recognized that there was no prescribed rule of competition, but that there was an applicable common-law doctrine, viz., that the courts would not intervene for the enforcement of contracts which upon the face of the facts they believed to be contrary to public policy. This left the whole field open as wide as the field of public policy, which is one of the widest fields in jurisprudence. But none of these cases held that there was any public policy which, at common law or through the statute, justified the positive and prohibitive intervention of the court.

There was a clear distinction between "contracts" in restraint of trade and "conspiracies." Contracts in restraint of trade were contracts with regard to the contractor's business and the trade restrained was the contractor's own. Conspiracies were intentional, unlawful devices against the rights of strangers. They were agreements among strangers to the contractor's business, designed wholly or partially to restrict the freedom of the stranger in carrying on that business as he otherwise would. The objection of the common law to contracts in restraint of trade was primarily on the contractor's own account.

That such was the law here, immediately prior to the passage of the Sherman Act, as well as the law in England at the same time, is clearly demonstrated by *Gibbs* v. *Baltimore Gas Co.* Consideration of

objections on the part of the community's interest did not arise until the notion of monopoly arose, and that only arose in England when the particular contract covered the whole of England, and in this country when the particular contract covered the whole of the State or the whole of the United States.

We consequently have three classes of cases — contracts in restraint of trade, which were held unenforceable because it was against public policy that the party defendant should deprive himself of the right to make a living; the same class of contracts which were also against public policy because they affected the whole community and were of the nature of monopoly; conspiracies to injure those who were strangers to the agreement by unlawful interference with their rights.

In the first two classes of cases the question of intent was not involved at all. The court read the particular intent from the contract, and then, as it found one intent or another, declared the contract to be enforceable or unenforceable. The contract was not unlawful, the acts of the parties were not subject to punishment, and therefore the consequences of the act, and not the motive of the act, were alone considered.

In the third class of cases motive or intent was of the essence of the act whether it was approached through the criminal or the equity side of the court.

We are not concerned with the ancient aspects of the law, because it was part of the public policy of the times, and that public policy changes with the times is pointed out throughout the long line of cases from *Mitchell* v. *Reynolds* to *Mogul S. S. Co.* v. *McGregor* and from the earliest case in this country to *Gibbs* v. *Baltimore Gas Co.*

It would be needless to go further at this point were it not for the fact that the government has quoted *Leisy* v. *Hardin,* 135 U. S.; *Vance* v. *Vandercook,* 170 U. S.; *In Re Debbs,* 158 U. S., and other cases as in-

dictating that it was the Federal law that commerce should be free and untrammeled without reference to the Anti-Trust Act of 1890. In other words, that even if the Act had not been passed the government would have the same right to become a party to the action as it now has.

We insist upon the fact that the Federal government was not a party in any of the cases referred to. The cases such as *Leisy* v. *Hardin, Vance* v. *Vandercook; Rhodes* v. *Iowa; Adams Express Co.* v. *Kentucky,* involve no questions similar to those involved in the case at bar or similar to those involved in any of the cases which have arisen under the Anti-Trust Act.

It is obvious on the face of all of these cases that the States had passed laws impairing the rights of individuals to engage in interstate commerce. It was an absolute legislative deprivation which attempted to exclude the plaintiffs as citizens of the United States from their positive right to engage in interstate commerce, and in respect of this, this court said that unless Congress itself imposes such limitation of the universal right, it must be assumed that so far as legislative interference with rights was concerned, commerce must be held to be free and untrammeled.

This is an entirely different proposition from that of the legality or illegality of the consequences of competition or of the attractiveness of business. Every man in the community has an equal right, *qua* right, to engage in any trade whatever. That right *qua* right is in no sense affected, or certainly was in no sense affected, at common law by the consequences of the acts of third parties unless such acts were conspiracies by force, duress, fraud or other unlawful means designed intentionally, not to deprive the party plaintiff of his right but to impair his power to exercise that right; and when a State by legislation

sought either to deprive a citizen of that right or to impair it, this court held, that the legislation was inoperative in precisely the same manner in which they held that contracts in restraint of trade were inoperative because in violation of public policy, with the additional reason in the cases of the actions against the States that they were violative of the constitutional rights of the plaintiffs. But there was no declaration in any of these cases that competition should be free in the sense that whatever modified, limited or impaired competition, even though it was in the natural economic order or positively authorized by a State, was unlawful. If the government's contention be right it follows that even before the passage of the Sherman Act every State law authorizing corporate consolidations was and consequently now is invalid, a point which has been more than sufficiently developed by Mr. Justice White in his opinion in the *Northern Securities Co. case.*

The state of the law before the passage of the Act of 1890 is summed up more admirably than anywhere else in the opinion of President Taft while sitting on the bench of the Circuit Court of Appeals in the *Addyston Pipe Co. case,*

" For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business *not to compete* with the buyer *in such a way as to derogate from the value of the property* or business sold; (2) *by a retiring partner* not to compete with the firm; (3) *by a partner* pending the partnership *not to* do anything to *interfere,* by competition or otherwise, with the business of the firm; (4) *by the buyer of property not to use the same in competition* with the business retained by *the seller;* and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, *the court must find that the restraints attempted*

thereby are reasonably necessary (1, 2 and 3) *to the enjoyment by the buyer of the property,* good will, or interest in the partnership bought; or (4) *to the legitimate ends of the existing partnership;* or (5) *to the prevention of possible injury to the business of the seller,* from use by the buyer of the thing sold; or (6) *to protection from the danger of loss to the employer's business* caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business.

But in recent years even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of *a plan to acquire all the property used in a business by one management with a view to establishing a monopoly.* Such cases go a step further than those already considered. *In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition.* In such cases the restraint of competition ceases to be ancillary and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement is merely ancillary to that purpose. The principal cases of this class are Richardson v. Buhl (77 Mich. 632; 43 N. W. 1102), Arnot v. Coal Co. (68 N. Y. 558), People v. Milk Exchange (145 N. Y. 267; 39 N. E. 1062), People v. Refining Co. (54 Hun, 366; 7 N. Y. Supp. 406), State v. Nebraska Distilling Co. (29 Nebr. 700; 46 N. W. 155), State v. Standard Oil Co. (49 Ohio St. 137; 30 N. E. 279), Manufacturing Co. v. Klots (44 Fed. 721), Distilling & Cattle Feeding Co. v. People (156 Ill. 448; 41 N. E. 188), Carbon Co. v. McMillan (119 N. Y. 46; 23 N. E. 530), Harrow Co. v. Hench (83 Fed. 36), Factor Co. v. Adler (90 Cal. 110; 27 Pac. 36), Lumber Co. v. Hayes (76 Cal. 387; 18 Pac. 391)."

XII.

HISTORICAL DEVELOPMENT OF THE LAW OF COMBINATIONS IN RESTRAINT OF TRADE.

At common law restraint of trade had no other meanings that those specified by Mr. Justice Holmes in the *Northern Securities case.*

The earliest case is that of the Abbot of Lilleshall, A. D., 1221, which illustrates the principle upon which we dwell, viz., that the State will not permit combinations in restraint of freedom. This particular instance bears equally upon the questions of conspiracy and of combination in restraint of trade. The statement of facts first published by the Selden Society in 1877 is as follows:

"The Abbot of Lilleshall complains that the bailiffs of Shrewsbury do him many injuries against his liberty, and that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the Abbot or his men upon pain of forfeiting ten shillings, and that Richard Pecke, the bedell of the said town, made this proclamation by their orders. And the bailiffs defend all of it, and Richard likewise defends all of it and that he never heard any such proclamation made by anyone, &c."

Commenting on this, Professor Stimson (Popular Law-Making, p. 71) says:

"This is a remarkable report, for in twelve lines (ten lines of the law Latin) we have here set forth all the important principles of the law of boycott."

It is certain that what the Abbot complained of was the restraint of his liberty to purchase, precisely the same sort of restraint of trade as that which the Supreme Court has held in the Hatters case to be prohibited by the Act of 1890. It cannot be doubted that this was common law in the several States wherever such restraint of trade was the object of the conspiracy, but this was undoubtedly due to the principle involved in the common law of conspiracy elsewhere discussed.

The common law in respect of conspiracy to affect restraint of trade was declared in England certainly as early as 1427. The first Statute of Conspiracy was that of 1305, which was directed to conspiracies for the purpose of maintaining law suits. The Statute of Laborers of 1360 was directed to combinations or conspiracies between certain classes of artisans. The statute of 1426 to which I have referred and which is directly connected with the history of combinations against the general interest prohibited " guilds, fraternities and other companies corporate " from adopting any ordinances or by-laws " against the common profit of the people," and requiring that all their charters, letters-patent, ordinances and by-laws be recorded before a justice of the peace.

Ten years later, in 1436, we have for the first time the use of the term " Restraint of Trade " in what would seem to be the precise meaning generally attributed to that phrase by the several Anti-Trust Acts of the States and by the Sherman Act of 1890. This seems to be the first time, moreover, in which the term " restraint of trade " was ever used for any purpose whatsoever in any English statute. This law in purpose seems to correspond perfectly with all these later acts, and the Texas act in particular, and those other State statutes which have taken the latter as a type. It prohibited guilds and corporations (meaning by the latter

the trade companies of the time) from passing by-laws (*i. e.*, combining among their members by contract in form of by-laws) "in restraint of trade," and also prohibited them from what we now call making price-lists by general ordinance or resolution "for their own profit and to the common hurt of the people," and such by-laws were declared invalid and were penalized, except when approved by the chancellor. This seems to combine the inhibitions of our anti-trust statutes with the rate regulating powers provided for in some of our Public Service Laws. Referring to this statute, Professor Stimson (Popular Law-Making, p. 70) very properly says:

"From this century, at least, therefore, dates that doctrine of the common law which makes unlawful any contract or combination in restraint of trade, and it was left for the succeeding century to develop the last great principle, that against monopoly, caused either by unlawful combination of individuals or grant by the crown itself."

The next legislative recognition of this principle was by the statute of 1503 directed against price making by illegal by-laws and the preamble of which contains this statement of the evils sought to be corrected, viz.: "companies corporate by color of rule and governance to them granted and confirmed by charters and letters patent of divers Kings made among themselves many unlawful and unreasonable ordinances as well in price of wares as other things for their own singular profit and to the common hurt and damage of the people," and all such by-laws were forbidden except under the particular provisions of governmental approval provided for in the statute, but goes further and contains this very sweeping provision:

"No masters, fellowships of crafts or rulers of guilds or fraternities may make any acts or ordinances

against the common profit of the people but with the examination and approval of the Chancellor."

If we seek the determining motive in this early legislation we shall find that it is the legislative expression of that principle essential to the existence of the State; viz. that no groups other or smaller than the State shall by private legislation do that which is injurious to the welfare of the people as the same is conceived by the representatives of the State. The matter of price is incidental. The essential thing is indicated by the phrases contained in these different early statutes—"ordinances against the common weal of the people," "the common hurt of the people," "ordinances against the common profit of the people." Now if, under modern conditions, we substitute "contracts, combinations or conspiracies" for the terms "by-laws" or "ordinances" we find that Congress is aiming at precisely the same thing now as Parliament aimed at then.

The interference by private law (for every ordinance as well as every contract is private legislation) with those matters which should be under the governance only of the public law, *i. e.*, the substitution of the will of a part of the people for the will of the whole of the people, is undoubtedly at the root of the juridical principle upon which the legislation then was and now is based. The substantive concept is the private legislation; the contract or the combination or the ordinance is the adjective concept against the "common weal"; and then within this latter there is a specification of the particular respect in which it was against the "common weal," *e. g.*, the fixing of prices.

It is precisely here, however, that the Federal act of 1890 is peculiar, because, while all the early statutes referred in terms to the making of prices as the specification within the general purpose of the law, and while many of our State acts, particularly those of

Texas and Arkansas, do precisely the same thing, Congress, in the enactment of the Law of 1890, deliberately avoided refering to this matter of price and confined itself to contracts, combinations and conspiracies in restraint of trade or looking to monopolization, and was therefore broad enough to take in labor combinations, boycotting combinations, buying combinations, as well as combinations unlawfully to affect prices.

XIII.

HISTORICAL DEVELOPMENT OF THE LAW OF CONSPIRACY.

The first Statute of Conspiracy dates from 1305. It is of interest not so much because of the particular object to which it was addressed, viz., the prevention of conspiracies for the maintenance of law suits, but because it was the first legislative expression discoverable in history of the attempt on the part of a government to prevent conspiracy or combination among individuals for purposes believed by the legislative body to be adverse to the common interest.

The next application of the principle of legislative antagonism to combination seems to have been that contained in the Statute of Laborers of 1360, which declared all alliances and covins between masons, carpenters and guilds, chapters and ordinances, to be void.

Commenting upon the principle of conspiracy which appeared in the English law in even earlier statutes, Professor Stimson (Popular Law-Making, pp. 54–5) says:

"It is notable for two most important principles: first: that it recognizes the great menace of combined action, and both forbids and punishes combinations to do an act which might be lawful for the individual; second, of all branches of civil, as distinct from criminal, law, it is the one which most largely recognizes intent; that is to say, the ethical purposes of the combination."

This statute contains " a definition of conspirators." This phrase in fact is its title and it begins " Conspirators be those that do confeder or bind themselves together by oath, covenant, or other alliance, etc."

The conspiracies here aimed at were conspiracies to secure indictments or to maintain law suits and such other conspiracies " as retain men in the Countrie with Liveries or Fees for to maintain their malicious Enterprises, and this extends as well to the Takers as to the Givers."

For our purpose the particular object of the conspiracy is a matter of no importance. What is important is the definition which uses the terms " to confeder or bind themselves together by oath, covenant or *other alliance,*" the term " other alliance " undoubtedly including any agreement or contract, so that there can be no doubt whatever that *confederating, conspiring or combining as juridical terms in criminal law are identical,* and that " combination " used in conjunction with the word " conspiring " means the same thing as conspiring; and it always has been immaterial as to how the combination, confederation or conspiracy was brought about, whether by oath or by covenant, *i. e.,* by contract or other alliance. The thing which seems to be irrefutable is that conspiracy was merely a form of combination, and that where the words " conspiracy " and " combination " are used together the word " combination " has no other meaning than the customary tautological one of conspiracy; and the purpose of our law is no other than that of the historical purpose of the English common law to prevent conspiracies.

This certainly seems clearly enough to be the case when we consider the general common-law definition as it was first formulated by Blackstone, and as it has ever since remained part of our law, viz.:

"*A conspiracy is a combination* by two or more men, persons or companies, to bring about, either an unlawful result by means lawful or unlawful, or a lawful result by unlawful means."

Commenting on this definition Professor Stimson asks the question, "If you have a combination to bring about by *lawful* means the *injury* of a third person in his lawful rights — not amounting to a crime — is that an unlawful conspiracy?" The answer is that it is undoubtedly an unlawful conspiracy, but the controversy then at once turns upon the determination of the meaning of the phrase "lawful rights" of the third person. It certainly does not for an instant mean that the law of conspiracy or combination ever has been used or is now meant to be used for the purpose of endeavoring, through the action of the statute, to bring about conditions of economic equality. It may mean for instance that the right to compete should be unimpaired, but it cannot possibly mean that competition shall be equal, because, as we shall elsewhere see, the very principle of competition involves and implies the existence of economic inequalities.

A combination with an unlawful end and a conspiracy are identical — the one defines the other. The question involved in the construction of the Sherman Act is precisely this — whether it means to include as an unlawful aim anything which was not already included as such by common law as defined by Blackstone; whether in a word, it was anything more than the adoption of the common law of conspiracy for the purpose of the administration of the Federal law. And then immediately arises the question, if it mean more than this, "What more?" The several State statutes which have meant more than the common law have said so in terms. This statute, however, specifically refrains from so saying. The contention of

the government is that the act means not only to prohibit combinations with unlawful aims, but that whatever interferes with competition is such an unlawful aim—in other words that the Act is indirectly a legislative decree to the effect that "competition should be the law of trade," which is what the Supreme Court has held was meant by the Texas Act. Here we are again thrown back to the main difficulty, if this contention be admitted, which difficulty grows out of the economic contradiction contained in the idea of competition as a struggle between unequals, in which, and as the result of which, complete or partial monopoly is implicit.

XIV.

COMBINATIONS AND TRUSTS AT THE TIME OF THE PASSAGE OF THE ACT.

The kind of combinations which the Congress must specifically have had in mind, were precisely those the existence of which during preceding years had raised the issue of the desirability of or necessity for their prohibition. It certainly was not corporations — even if as great and controlling as the Carnegie Steel Co., or amalgamated and consolidated railroad systems like the New York, New Haven & Hartford; New York Central, and Pennsylvania Companies; nor great partnerships conducting consolidated department stores or doing a money-order business; nor express companies; nor trust companies; nor exchanges; nor trades unions — none of these things and none of the minor manifestations of the forces that have produced these things — but certain direct intentional efforts by contract to interfere with the freedom of the market by erecting a "state within the state" and providing an extrajudicial method of enforcing and penalizing breach — it being known to the parties that at common law such contracts were unenforceable. It was these intentional efforts — and only these efforts — to accomplish what could not be accomplished through the courts that the law aimed at. Their different forms were all familiar and well known, and yet Congress made no specifica-

tion, evidently because of its fear that there might still be left room for escape through the application by the courts of the rule *expressio unius est exclusio alterius.* Still the class of combinations aimed at was easily identifiable and had already developed every possible type, no matter what new names might be given them or what different names in different places. The genus was known and each species in the genus was known.

It was certainly not intended to interfere with every natural and spontaneous economic process, and least of all with those groups that had been authorized and encouraged by the several States, and had come into existence as part of the necessary mechanism of industry and distribution — but with particular groups designed to secure peculiar and exclusive advantages to the parties to the contracts and to work a corresponding disadvantage or harm to all others. To prohibit these things was not only a proper function but a duty of both the State Legislatures and of Congress — none of which were legislating in the dark and none of which were legislating theoretically to convert any kind of a belief into a statute, but all of which sought a practical remedy for an obvious wrong. The preliminary report on Trusts made by our Federal Industrial Commission shows clearly what different forms the wrongs complained of had assumed up to the time at which the report was made.

Combinations were organized and deliberate efforts by contracts, known not to be enforceable in the courts, to control or regulate the market, and they were quite distinct from what were known as corners, which latter had a definition of their own.

Liberty means freedom to combine as well as to compete and the new Act was a limitation of this liberty in respect of its future exercise in directions which Congress believed injurious to the whole community. There was no limitation or modification of the freedom

to compete but there was precisely the limitation of the freedom to combine in "the form of trust or otherwise," *i. e.*, in any of the forms then known to practice, or in any similar new forms which might be devised,—but not those combinations which were approved by the State or which had become part of the fundamental economic constitution of the country and, we may say, of the world. It was not an attempted deprivation of all freedom of combination but of combination "in the form of trust or otherwise," brought about by particular contract or agreement, designed to restrain or to monopolize trade. There was no mystery and there never need have been any mystery about its purpose. These combinations did not deal with either manufacture as such or with ownership as such. Their subject-matter was legally unenforceable methods for restraining or monopolizing trade and nothing more.

Combinations may be designed to secure either lower or higher prices. The first great subdivision for purposes of classification is into combinations to buy, and combinations to sell.

It is doubtful whether Congress had at all in mind combinations to buy, inasmuch as there had never been any attempt to create any such combinations, of any such magnitude as to attract public attention, or to be regarded as a public harm or danger, and certainly such a form of combination as a co-operative purchasing association was not in the mind of Congress.

Neither were there included Combinations for the Settlement of Terms on which business shall be done, but not in restraint of trade, *e. g.*, regulating and fixing any or all of the following things — terms of credit; discounts; packing; terms of delivery; duration of contracts when among merchants; and form of charter party as to loading, discharging, demurrage,

wharfage, port dues, conduct of voyage and method of payment of freight when the agreement was between shipowners. All of these were exercises of the freedom of combination and limitations of the freedom of competition, and all are under the ban of the Act if the court below be right, and yet it is certain that these are not the things that Congress had in mind and of which the public opinion that drove Congress into the passage of the Act complained.

The thing aimed at essentially was the selling combinations. These were uniformly and invariably based upon contract — written or oral, for a fixed term, and the group was known generally as an " association " of which there were diverse kinds.

These, beginning with the simplest class and following to the most complex were:

A. Price Associations. These were of many varieties, were generally local or territorial, never national, and were certainly aimed at by the Act. The simplest forms were to secure concerted action for regulating prices, to conform to the fluctuations in price of labor and materials, or to regulate prices according to seasons. It was distinctly an agreement to end competition *quoad hoc.*

Another form was a combination for an arbitrary term, to fix prices from time to time and, penalize the breach of the contract by members of the association. These associations were formed between persons in the same trade and looked not only to regulating prices as between the parties but to the protection of such prices against outsiders. They were highly organized with the machinery of committees, officers, arbitrators, etc., and had a private penal law. Sometimes they were created by written contract, sometimes by oral or " gentleman's " agreement, and sometimes by the adoption of one method for one part and of another method for other parts of the scheme.

Sometimes their organization was so lacking in formality that their existence was peculiarly difficult of proof, and it was to reach these forms as well as others where proof was easier that Congress used the sweeping term "or otherwise."

There was a subdivision into groups of this class dependent upon whether they dealt with wholesale or retail business or with both, and in all of these a still further subdivision determined by the means sought:

(1) To compel adherence to the agreement by the parties to it;

(2) To maintain price lists as against outsiders. Some were persuasive, some were boycotts, some were retributive, and each was more or less injurious to strangers and the public.

B. The next is that of groups for the Regulation of Output, sometimes with synchronous regulation of prices, sometimes with freedom as to prices.

This class C was generally known as pools or syndicates and one of the leading authorities on the subject, Dr. Grunzi (in Uber Kartelle, Leipzig, 1902) has classified them as follows:

(1) The syndicating of production where each member is assigned a quota of the total output of the associated concerns;

(2) A syndicating of sales, where each party is allowed to put on the home market an agreed *quantum*, etc.

(3) A pooling of profits, which are paid into a common fund and distributed in agreed proportions.

The economic weakness of these pools or syndicates is the necessity for constant readjustment. Where the third form prevails different subforms are introduced which are fixed by the manner of determining profits, fixing an arbitrary scale of costs or taking actual cost as a base, etc.

C. Sales Associations in which the parties instead of selling to jobbers, retailers or consumers, create co-operative selling agencies, through which all of the parties have to sell their output. There is a further subdivision here.

(1) Where the output to be sold through such agents is unlimited;
(2) Where the output is limited.

The selling agents were sometimes organized as firms, sometimes as corporations, and the agreements to sell through these agents were for longer or shorter terms, the interest or share in the agents being taken in agreed proportions between the producers.

In all combinations of this class D there was a high administrative and regulative organization, including provisions for arbitration of disputes and penalties for breach.

None of the forms A, B, C or D ever passed over into the still more centralized form of a trust.

D. The Trust.— Where the holders of majority shares in different competing concerns turned their shares over to trustees and in lieu thereof took trustees' receipts or certificates, the trustees thereafter managing all of the concentrated businesses and distributing profits as agreed among the holders of the certificates.

The Holding Company took the place of the trustees. It had no business of its own and was only a kind of centralized custodian and not a maker of, but a clearing-house for, profits.

These were all known in practice at the time of the passage of the act, and *were all entirely distinct from that form of combination of capital and ability which had long existed as the joint-stock association or corporation, whether the latter represented a primary*

combination, or a combination of such combinations through amalgamations, by way of corporate merger as authorized by law, or of purchase of properties as also authorized by law.

In the case of the corporation or amalgamation of corporations and the creation of new subordinate or departmental corporations, the purpose was not restraint of trade or advance of price, but the perfection of business technique and the saving of all intermediate and collateral costs. It was an application of the evolutionary law of differentiation and integration, designed not to injure competitors or to exclude them from the business except, so far as these things were necessary and inevitable consequences of the realization of the utmost economy and the greatest efficiency incident to the fundamental right of association, precisely as in the case of every individual business or enterprise whatever.

XV.

CANONS OF CONSTRUCTION.

We begin by a recognition of the difference frequently pointed out by this court between construction and validity. The two things nevertheless have been frequently disregarded. The argument for the government proceeds on the assumption that Congress intends whatever it has the power to intend and thus to shift the legislation from Congress to the courts. It does not follow that every purpose which would be valid must, because of that fact, be construed into a statute. This is to reverse the process and to proceed from validity to construction rather than from construction to validity.

The construction sought to be given the statute involves the introduction into our system of a new theory and practice of governmental power under which it would be possible for the government to regulate practically every economic activity the result of which enters into interstate commerce. It involves not only the whole theory of juridical law, but the whole theory of economic law as well, and the relation of these two systems of law to each other and the consequences of their possible conflict.

Questions of such magnitude require the application to the statute of a clear and definite theory of the nature of juridical law (as such) and the form in which

it manifests itself,— for the court in the case at bar is called upon not only to judge rights but to measure the power of government, and it is inconceivable that this court will construe a statute which must harmonize with the whole body of the law, so as to give it a meaning which, by tests of practicability, is shown historically to be impossible of satisfaction. In the evolution of our legal system every new law must be construed as a manifestation of the principle of continuity not only but of the principle of justice.

In the case at bar we are asked to measure the rights of the citizen and the rights of the government, and we must bear in mind the consideration aptly stated by von Ihering:

"Whoever wants to measure must have a standard of measure, and the measure by which to judge a particular right can only be supplied to us by the doctrine of the nature of right or law in general and the form in which it manifests itself."[1]

The measure in a case like that at bar, which is of necessity largely determined by economic considerations and by the relation of the juridical to the economic constitution, must be found in the accurate determination of these relations, and above all in the accurate determination as to whether or not there really exists such an economic order as that in behalf of which the statute is alleged to have been enacted. If it be found that this supposed economic order is theory pure and simple, and rises to nothing more dignified in fact than myth, then this fact must itself be considered by a court which cannot, even at the command of the Legislature, attempt to apply a myth as a rule of construction.

It would not become the character of a serious ad-

[1] Von Ihering, Geist des römeschen Recht, vol. I, p. 23. We quote freely from this chapter of the great German jurist because his work is not accessible in English.

vocate to endeavor to impress upon this tribunal the merely formal rules of construction. This court is as familiar with them as it is possible for any tribunal to be. But there are certain standards of construction the question of the application of which rarely arises—standards which involve principles larger than any particular technical rule of interpretation, and of these it may not be unwisely asserted that *fundamental to all considerations of construction is that of the nature and character of law itself,* and that a statute which by one construction clearly and plainly would be violative of the proper nature of law should never be adopted when another construction harmonizes with the nature of law and places the statute in question in its natural place.

Next after this the evolution of jurisprudence should be considered. We here have just such an instance, and, if it be found by the construction for which we contend that this particular Act will fall properly in its historical place in the line of legal evolution and of economic development, then our claim for such construction will prevail, whereas if it be found that the construction contended for by the government is one which has a tendency to disturb the true and natural course of juridical development and to constitute an obstacle in the way of natural economic growth, then such a rule of construction will be condemned.

"The law, according to the idea of our time, is an objective organism of human liberty. It is no longer denied that law is not, as it used to be conceived, an external aggregate of arbitrary provisions owing its origin to the thought of the legislator; it is, like the language of a people, the internal and regulated product of history. Undoubtedly intention and human calculation contribute to its formation but both of these find it rather than create it, because the birth and formation of the relations in which the human species live does not depend upon intention and calculation. Law and its institutions have blossomed under the im-

pulse of life, and it is this which preserves their incessant external activity. The form which the character of the people in its whole mode of existence has impressed upon law, precedes all thought and all legislative will.''[2]

It is the duty of the court to consider the relation of the new legislation not only to the specific provisions of the common law but to the very nature out of which common law grows and of which common law is only a manifestation. It is for the court to bear in mind that its interpretation of the statute in turn becomes part of the common law, and that if the Legislature can be held to have had either of two views in mind in the passage of the law, that view must be adopted, as already suggested, which places the statute in its proper place as an aspect of evolution and not of revolution.

We claim that the construction of the statute compels the consideration of the established order and the relation of it to the proposed new order, and among other things whether this new order under a given construction comports with the life of the law itself.

If the court feels compelled to regard it as revolutionary and that it has no authority in the premises, the meaning being clear, that is the end of the matter, but if, on the other hand, the meaning is not clear, if there be no reason for supposing that revolution was meant, and if, going further, it may be said that the Act can be construed clearly as an evolutionary statute, then it is claimed without fear of contradiction that this construction must prevail. The revolutionary purpose in the mind of the Legislature at the time of the passage of the law must have been clearly expressed.

That there may years afterward be a revolutionary feeling on the part of the Government, with which

[2] *Op. cit.* pp. 25, 26.

it is sought to indoctrinate the court, is no reason why juridical evolution should be interfered with by the application of standards of a revolutionary character which have found no clear and proper national expression, and which contradict what may be treated as a clear, cohesive and logical expression, fitting squarely into the history of legal development afforded by the reading of a statute in the light of law and practice. No construction should ever violate the spirit of law unless the court is prepared to take the position that the purpose of law is lawlessness.

"So far as law is concerned it is necessary that he who attempts to construe it or to understand it shall know how to find its true quintessence under the rough envelope of the concrete relations of life, of which he ought to extract the rule. * * *.

"In this world we find ourselves in the presence of a determining organism. We are so habituated to see it work on with uniformity that we never think of asking to what extent this order is purely factitious or accidental or juridical and necessary, but if some one disturbs this order at a given point our attention is awakened and then we ask the reason for the established order."[3]

It is of the utmost importance in critical cases that the court should be exceedingly careful of accepting public opinion. The public opinion of the moment is no guide to construction. One of the duties of the court is to preserve the commonwealth from the errors of the uninformed.

"Knowledge of the law is acquired painfully and slowly by a people. Many things escape the notice of science even when law has reached its maturity. However great the ability of the Roman jurisconsults, there existed even in their time rules of law which were unknown to them and which were brought to light for the first time thanks to the efforts of present day jurisprudence. I call these the latent rules of law.

[3] *Op. cit.* p. 29.

But we may be asked is that possible, because to apply these rules it is necessary to know them. It is sufficient answer to advise these objectors to consider the laws of speech. Thousands apply them daily without ever having heard them spoken of. * * *.

"We are not unjust when we say to rude and uneducated peoples, 'You have only understood the smallest part of the juridical world which surrounds you. The other part escapes your intelligence and only lies in your feelings. You live in the midst of juridical relations without knowing the nature of these relations. You act according to laws which none of you have ever expressed. The rules of right which you are familiar with are only isolated rays of light which the world of real law has cast into your understanding."[4] * * *.

"Let us now go a step further in the examination of the structure of the juridical organism. The rules of law with which we have concerned ourselves up to this time are deduced by way of abstraction from the examination of the relations of life — they are made to express and to fix the intimate nature of these. We often need the co-operation of a number of these rules to establish the juridical formation of a single relation of life. In that case they find their point of union in this common end. They surround it as the muscles do the bones. The relation of life thus translated into juridical form may be in its turn the relation of dependence upon another relation with which it is connected. * * * In this way different juridical relations of life which as such may be the object of a separate examination, combine around and form great systematic unities: the juridical institutions. * * *.

"The duty of science is to study this disposition of the members of law and to seek out the true place of the least as well as of the greatest. This systematic side of jurisprudence is infinitely more important than it would at first sight appear."[5]

And we can see that there is no higher rule of construction or final test of meaning than this other proposition of von Ihering:

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[4] *Op. cit.* pp. 29, 30.

[5] *Op. cit.* pp. 35, 36.

"The function of law in general is to realize itself. A law which does not realize itself is not law at all."[6]

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"The reason for the existence of a given institution and for its form are to be found in the end and needs of a particular epoch. And it is in the condition established by the latter that we find the reason because of which one institution has become possible and another has become useless. This idea that no law can be understood except from the point of view of actual life has no need of justification even for the laity.

"But the objective difficulty or possibility of applying a rule of law is determined by the rule itself according as its provisions involve criteriums difficult or easy of recognition."[7]

It is a canon of construction that every statute must be read not only so as to make it conform with the Constitution, but so as to make it conform, if possible, with all other statutes *in pari materia.* It must, if possible, be read so as to make it consistent and harmonious with the whole *corpus juris,* with the historical development of the entire system or body of law, and not to constitute a breach of continuity in juridical development, but only a new accommodation of juridical law with ethical, economic or political necessities.

Congress is assumed to have intended to create no new crimes save those which are specified, and not to interfere with natural normal development either of economic or administrative organization, save to the extent to which it has made itself clear. While constitutional provisions with regard to the powers of the government and the rights and liberties of citizens are to be widely construed, legislative provisions limiting the rights and liberties of the individual or creating new crimes are to be strictly construed, and terms which would be broadly construed where they make for freedom, for liberty or for rights of property and

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[6] *Op. cit.* p. 47.

[7] *Op. cit.* p. 50.

contract, must be narrowly construed where they make against any of these things.

The court will never assume that it was the intention of the Legislature to depart from the general principles of law. Moreover it will always be assumed by the court that the Legislature, Federal or State, has itself intended that its acts be given a reasonable and not an unreasonable construction; that under no circumstances did the Legislature intend a usurpation; that Congress itself recognizes that it has no arbitrary power and could not have intended to vest the government with arbitrary power; or to have intended that which, if carried out, would demonstrate its intention to be either unwise or injurious; that Congress itself must have foreseen the consequences of its act and to have foreseen that the courts would foresee the consequences of its act; and that as it would not have intended consequences which would be revolutionary, so, if it be demonstrated that the consequences would be revolutionary either of juridical principle or of the economic order, then the act must be either held not to have intended those consequences, or its validity must be tested by those consequences, particularly if one be a political revolution.

While the debates and personal expression of opinion in Congress may be of value, they are not controlling and may be wholly disregarded because, inasmuch as *the intention of Congress can only be read through the legislation itself, the ultimate question is always the intent of the legislation, and that is not determinable by the intention of Congress but the intention of Congress is determined by that.*

Rules to the effect that a given contract is against public policy should not be extended so as arbitrarily to interfere with the freedom of contract nor should their meaning be legally so extended, if they amount to the taking of property within due process of law. (*Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 369.)

Every statute must be construed as having been passed in the light of well-settled principles and not

to be intended to limit and restrict the rights of corporations created by States or of the citizens of States in the acquisition, control or disposition of property. (Fuller, C. J., in *Knight case,* Jackson, J., in Re Greene.)

" It is the duty of the court to ascertain the meaning of the statute from the words used in the subject-matter to which the statute relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never meant to include in it." (Fuller, C. J., *Petrie* v. *Bank,* 142 U. S. 650.)

The question of definition " is perpetually arising and will probably continue to arise so long as our system shall exist." Marshall, C. J., in *McCullough* v. *Maryland.*)

The court has the right and it is its duty to consider whether a given construction can be universally enforced; or whether the real consequence of such construction will or will not be to create an arbitrary and dangerous power of rewards and punishments, and to consider whether the creation of such power was intended by the Congress.

It is a fundamental canon that words should not be permitted to rule over reason.

" Men believe that their reason rules over words; but it is also the case that words re-act and in turn use their influence in the intellect." (Bacon, Novum Organum, 1–59.)

In common use almost every word has many shades of meaning, and that particular meaning which is the juridicial meaning is to be determined if law is to afford any certain rule of action. It is precisely this fact which distinguishes law from ethics, economics and politics, and colloquial or popular meanings, from technical and legal meanings. On the other hand

unless it makes its purpose clear, Congress, when enacting law, must be assumed to act within the domain of legal concepts and to have used legal terms in their accepted legal sense. It is the practice of Legislatures when such is the legislative purpose, in so many words to say that the legal sense of a term is not the sense meant, as for instance in those statutes which say that the word " heirs " shall be intended to include not only devisees, but also next of kin and distributees.

Construction, if possible, must always be in conformity with existing economic conditions, as well as the fundamental canons of natural law, meaning thereby the uniformity of natural processes as undisturbed by factors external to the process, and no statute must be construed in such a way as necessarily to involve a conflict of natural order with the judicial order unless such construction is inevitable.

While the courts will recognize that within the limitations of its power " Congress must possess the choice of means " (Marshall, C. J., *U. S.* v. *Fasher,* 2 Cranch, 258), nevertheless, if possible, they will find the means chosen to be one which is intelligent, historically correct and economically efficient, instead of one which is not. Such being the case these three questions are always raised naturally and properly in the construction of a statute such as the one in question. The court will not assume that Congress has adopted means which are inappropriate and which are not plainly adapted to a legitimate end designed by Congress within the scope of the Constitution.

In his opinion, expressly concurred in by Messrs. Gray, Field and Shiras, JJ., in the *Trans-Missouri case,* Mr. Justice White said, in application of these fundamental principles for which we contend; and in respect of these there seems to have been no controversy:

" I commence, then, with these two conceded propositions, one of law, and the other of fact,

" First, that only such contracts as unreasonably restrain trade are violative of the general law; and,

" Second, that the particular contract here under consideration is reasonable, and therefore not unlawful if the general principles of law are to be applied to it.

" The theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the act of Congress already referred to.

" Now at the outset it is necessary to understand the full import of this conclusion.

"As it is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the general law, the decision, substantially, *is that the act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many very reasonable contracts.*

" But this proposition I submit, is tantamount to the assertion *that the act of Congress is itself unreasonable.*

" The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded, for, of course, *where the fundamental proposition upon which the whole proposition rests is that the act of Congress is unreasonable, it would seem conducive to no useful purpose to invoke reason* as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason.

" *The question, then, is, is the act of Congress relied on to be so interpreted as to give it a reasonable meaning,* or is it to be construed as being unreasonable and as violative of the elementary principles of justice?" (The italics are ours.)

If possible, every statute should be construed as a developed custom, so that the subsequent growth or the unfolding of the statute, as well as the growth of its interpretation, is of the identical nature with the growth of custom itself.

In support of these propositions we rely upon the authorities cited in the note.

NOTE.—"A law is the best expositor of itself." (Marshall, C. J., *Pennington* v. *Coxe*, 2 Cranch, 52.)

"It is the maxim that, *consuetudo est optimus interpres legum;* and another maxim that, *contemporanea exposito est optima et fortissima in lege.*" (Bradley, J., *Boyd* v. *U. S.*, 116 U. S. 622.)

"A thing may be within the letter of a statute and not within its meaning and within its meaning though not within its letter." (23 Wall. 380; 11 Wall. 504; 18 Wall. 301; 93 U. S. 300; 95 U. S. 763; 91 U. S. 715; 101 U. S. 626; 143 U. S. 459; 181 U. S. 267.)

"There is no canon of interpretation which requires that the letter be followed, when by so doing an unreasonable result is accomplished. On the contrary the rule is the other way and exacts that the spirit which vivifies, and not the letter which kills, is the proper ground by which to correctly interpret a statute." (White, J., *U. S.* v. *Trans-Mo. Freight Assn.*, 166 U. S. 354.)

"The purpose of a statute in whatever language it may be framed must be determined by its general and reasonable effect." (Harlan, J., *Reid* v. *Colorado*, 187 U. S. 150.)

"This court will look into the operation and effect of a statute to determine its purpose." (Miller, J., *Morgan* v. *La.*, 118 U. S. 462.)

"Where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law • • • for statutes are not presumed to make any alteration in the common law beyond what is expressed in the statute." (Clifford, J., *Ross* v. *Jones*, 22 Wall. 592.)

"It is impossible to determine with certainty what construction was put upon the act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." (Peckham, J., *U. S.* v. *Trans-Mo. Freight Assn.*, 166 U. S. 318. And see Field, J., 194 U. S. 394, and 176 U. S. 601; Gray, J., 196 U. S. 699; Brown, J., 182 U. S. 254; Johnson, J., *Huidekoper* v. *Douglass*, 3 Cranch, 72.)

"Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property." (Marshall, C. J., *Rutherford* v. *Green*, 2 Wheat. 203.)

"It is an established rule that the terms employed by the Legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them." (Chase, C. J., *Hepburn* v. *Griswold*, 8 Wall. 607.)

"When a statute will bear two constructions, one of which would be

within the constitutional power of Congress to enforce, and the other a transgression of the power, that must be adopted which is consistent with the Constitution." (Strong, J., *Miller* v. *U. S.*, 11 Wall. 309.)

"It is an acknowledged principle of law, that if the rights have been acquired under a judicial interpretation of a statute which has been acquiesced in by the public, such rights ought not to be impaired or disturbed by a different construction." (Brown, J., *Schell* v. *Fauche*, 138 U. S. 572. See also *Case of Genesee Chief.*)

"The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law." (Fuller, C. J., *Johnson* v. *Southern Pac. R. Co.*, 196 U. S. 17.)

"In the construction of a statute every presumption is against it." (*Central R. R.* v. *Georgia*, 92 U. S. 674.)

"Courts uniformly refuse to give to statutes a retrospective operation, where rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature." (Harlan, J., *Cook* v. *U. S.*, 138 U. S. 181. And see Clifford, J., "20 Per Cent. Cases," 20 Wall. 187. See also Swayne, J., *U. S.* v. *Moore*, 95 U. S. 762; McLean, J., *Lewis* v. *Lewis*, 7 How. 784; Fuller, C. J., *Stephens* v. *Cherokee Nation*, 174 U. S. 478.)

"All agree that before a statute is to be taken to punish that which always has been lawful, it must express its intent in clear words." (Holmes, J., *Northern Securities Case*, 193 U. S. 402.)

"The better rule of construction is to hold that the Legislature meant what they have actually expressed, unless some manifest incongruity would result from doing so, or unless the context clearly shows that such a construction would be erroneous. Words may sometimes be transposed, but they cannot be inserted. Intention, it is true, should govern, but it must be such an intention as the Legislature have used fit words to express." (Clifford, J., *Union Tel. Co.* v. *Eyser*, 19 Wall. 432.)

"Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any *bona fide* transaction or title." (Grier, J., *Griffith* v. *Bogert*, 18 How. 163.)

"Nothing is better settled than that statutes should receive a sensible construction." (Fuller, C. J., *Lau Ow Bew* v. *U. S.*, 144 U. S. 59.)

"Statutes must always have a reasonable construction." (Harlan, J., *Plessy* v. *Ferguson*, 163 U. S. 558.)

"The general purpose of a statute is a more important aid to the meaning than any rule which grammar or formal logic may lay down." (Holmes, J., *U. S.* v. *Whitridge*, 197 U. S. 143.)

"Where the language of a Legislature is clear, courts cannot be permitted to assume an intention repugnant to that language, because it imports what they think unreasonable; but words are not to be forced out of their natural meaning, to produce what is unreasonable, if not absurd." (Marshall, C. J., *Kirk* v. *Smith*, 9 Wheat. 272.)

"That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted." (Marshall, C. J., *U. S.* v. *Fisher*, 2 Cranch, 389.)

"The case must be a strong one indeed, which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention, which the words themselves did not suggest." (Marshall, C. J., *U. S.* v. *Wiltberger*, 5 Wheat. 96.)

"When a term is used in our Constitution or statutes which is known at the common law, we look to that system for its meaning." (McLean, J., *Ex parte Wells*, 18 How. 321.)

"Where technical words are used in an act, and their meaning has previously been conclusively settled by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. Particularly is the rule imperative where the statute in which the words are used creates a crime * * * and gives no specific definition of the crime created." (White, J., *U. S.* v. *Trans-Missouri Assn.*, 166 U. S. 353.)

"The same liberal construction which is required for the protection of life and liberty in all particulars in which life and liberty are of any value should be applied to the protection of private property." (Field, J., *Munn* v. *Ill.*, 94 U. S. 142.)

"A law which violates the spirit of the Constitution is as much unconstitutional as one which violates its letter." (Bradley, J., *Sinking Fund Cases*, 199 U. S. 744.)

"The people of the United States who ordained the Constitution never supposed that a change could be made in our system of government by mere judicial interpretation." (Harlan, J., *Downes* v. *Bidwell*, 182 U. S. 386.)

"It was held in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such or to limit and restrict the rights of corporations created by the States or the citizens of the States, in the acquisition or disposition of property." (Fuller, C. J., in the *Knight case.*)

XVI.

THE AIM OF THE STATUTE WAS TO PREVENT THE PRIVATE USURPATION OF THE EXCLUSIVE RIGHT OF THE COMMUNITY TO IMPOSE LIMITATIONS ON FREEDOM.

The legislation must be given *some* practical meaning. It is to be assumed that it was aimed at something — that that something had occurred and had been injurious to the community and that it would occur again and must be prevented and punished. But what was it?

The statute — expressed in the most general terms and containing no definitions, is blind — it is like the expression of a general desire rather than a law; it may be as wide as every economic human activity; it may be so narrow as to serve no practical purpose; it may be aimed at events without reference to design — it may be disregardful of purpose or intent or it may be aimed at those solely; it may aim at these when a given result is accomplished, or only at an attempt to bring about the result.

And so we have a series of questions which are really in the nature of a series of permutations or combinations, only some of which (or possibly only one of which, *i. e.*, one type of which) are aimed at by the law.

The first question is — Is there a known quantity in the statute which will account for its enactment — not to the satisfaction of the courts only but to that of justice.

The court may not find that the Act has no meaning that is constitutional — for it is obvious that it can be given a constitutional meaning. But that meaning may be so limited as to make the act inefficient. Therefore the purpose is to find for it a meaning that is both efficient and constitutional.

Here, therefore, we find on the side of limitation an extraneous known quantity — the Constitution itself. But that need not be treated as really extraneous, because it is supposed to be read into every law, or every law is supposed to be read in terms of it.

We therefore have a guide as to the limitations of the statute, and so, we may say on the score of constitutionality:—It must not confiscate or destroy property — it must not limit freedom — either of association, co-operation or contract — but only the wrongful exercise of freedom — and it must not invade the reserved powers of the States.

These propositions, however, are not only negative, but involve a number of definitions, precisions and applications and each is compounded of complexities and difficulties. We say over and beyond these things that the Act cannot be assumed (unless the expression of the purpose be inescapable) to have intended to introduce an element of such novelty into the whole system of law as to throw the whole out of adjustment. Therefore, as certain other extraneous known quantities, we can take as measures of delimitation certain fundamental jural concepts, the violation of which may not be assumed. We have already given a series of such propositions. Having gone thus far we may next ask what meanings, in view of all these limitations, *can* be given to the different words and phrases of the Act and of the whole as read together.

But for affirmative purposes we always have to find a known quantity in the words of the Act read in conjunction with the whole body of the law. This

can be easily enough found, provided we are satisfied to assume that the statute was, first: declaratory, and second, that it declared the pre-existing law in order to attach a sanction previously nonexistent. This may supply the solution — but the question remains, *was* that the solution intended, is it the only constitutional solution and will it satisfy the actual requirements of the case so as not to make further legislation necessary?

But if the law is to be constructed instead of construed — if the known quantity is not contained on the face of the Act read in conjunction with the whole body of law, and the court holds there is some other known or knowable quantity, then it must go outside of the Act to find it and perform those very functions which are generally supposed to be legislative,— and thus the whole economic and social question is at once thrown open to discussion.

Assume that Congress meant that competition must exist, that does not mean that conditions should be kept economically equal, but that they should be kept equal before the law. Nor does it mean that the law by endeavoring to enforce free competition meant to abolish the right to the natural consequence of free competition, viz., the right to grow and survive. It does obviously mean that certain agreements and combinations and conspiracies are prohibited.

The class of contracts and combinations which have been brought within the regulation or prohibition of the State has constantly varied and constantly enlarged. We must therefore look for the principle which governs this interference with freedom.

First, we must ask what contract itself is. The answer is, a private law which the State will enforce.

But there is a possible attempted relation among men which the State will not only not admit into the law but which it will punish — that is an agreement, not to

exercise one's right but, to exercise a power, the exercise of which is not one's right, *i. e.*, to do a wrong, to commit an injury, to apply superior force, to limit the freedom of action of others. But here design, purpose, intention must be shown for the simple reason that such a thing cannot, as matter of fact, be done by agreement save as the result of the pre-existence of the purpose or design.

A man may contract to give his services for a consideration exclusively to another for a longer or shorter term. Having made such an agreement he has exhausted his contractual capacity in that respect and cannot make another identical agreement. The first is valid and the second invalid, although the upholding of the first absolutely limits and restrains his capacity for contractual commerce of a certain kind with all the rest of the world — may be for his entire life. And yet the first contract will be upheld. It wrongs no one although it prevents every one but the party of the second part to the first contract of enjoying the monopoly of the first party's abilities.

But this immediately establishes an inequality in the field of competition, as an incident to and consequence of freedom. So by contract the greatest thing in the economic world, that is the greatest abilities, may be legally preempted and made a monopoly just as the ownership of land is as to any particular land a monopoly. If the consequence is to place others at a disadvantage that is not the affair of the law, for *the law is an equation of justice and not of advantages. The law does not exist for and has never claimed to guarantee equality of advantage, of capacity, of ability, of growth, of strength, of integrity, or repute. It declares that no one shall interfere with these advantages except by the equal right to enjoy his own advantage, and that all these advantages shall have perfect freedom to reap their reward in their measure.*

But society is a community made up of numberless other communities — limiting their powers for its own preservation, and never jealous of purely individual acts except where they are criminal, but jealous always of group action which would oust society of its power to maintain its own existence and to maintain those particular applications of social principle which are necessary to its existence. So we have the consecrated formula that the State will not tolerate a State within the State, *i. e.*, a combination to nullify the will or purpose of the State.

Here we are brought near to the things we are seeking; namely, our known quantities.

1st. What does the State desire?

2d. What is it, violative of this desire, that the State prohibits and punishes?

The State desires freedom and it desires freedom even in natural inequality. But it will not tolerate the use of freedom to create unnatural inequalities. The State desires whatever makes for national economy, growth, progress, civilization. But it will not tolerate that the legal direction of these things be taken out of its own hands by a small part of the community, *i. e.*, by any other community than itself. Therefore it permits the single individual to do or to attempt to do what it will not permit a number of individuals acting in concert to attempt to do. But it is the purpose of the attempt which it aims at.

On the other hand it encourages certain modes of community action. The entire history of modern corporations for all kinds of purposes is the recognition of this. In other words society through the State divides up its work by the creation of subordinate societies, and then by treating them as legal persons. This is the only way that society can do its work, and this is the characteristic of modern society. This is the principle of legal combination, as distin-

guished from illegal combination, and it has been the only means of realizing for society the benefits of scientific and technical progress.

In other words the State itself more than any other institution has availed of, sanctioned and approved the principle of division of labor and of delegation of function,— of combined and solidary economic and social action. This has been the secret of modern national greatness and has been the only means by which nations have been able to realize for the advantage of their people the benefits of the nations' assets of ability and wealth. It is characteristic of all our modern social constitutions.

But every State is always confronted with the necessity of restraining every *unjust* use of power, strength, wealth, capacity, for their own increase at the expense of others; and just as it has *encouraged* certain combinations, it has always *discouraged* certain others. The type of all prohibited combination is "conspiracy"— the combination of individuals with the view unlawfully to harm others, to interfere with their freedom to do with their property and their faculties as they please within the law.

So the State says every man must be *free* to embark — not *capable* to embark, but *if capable free* to embark — in any business or to limit his own freedom by valid contract. The exercise of this freedom involves the like freedom of every one else — but the risk of choice is on the free agent — all that he can ask of the State, and all that the State guarantees him, is that his agency be free, *i. e.*, unimpaired by the force or fraud of another. This is freedom to compete and freedom to survive — it is not a guarantee of equality of conditions in the competition, not that any person can call on the State to equalize and maintain the equilibrium of his position with all other positions.

That is not our form of government. It does not exist for the purpose of preventing the weak from going to the wall in spite of themselves, but only for the purpose of permitting all to try their strength, if they desire, without having their will restrained by any force other than the free play of all other wills. Therefore when the purpose of a contract or agreement among men is to coerce the will of another the law steps in and says No!

When the consequence of a contract having no such purpose is to create an event, which, like any other event, becomes a factor in the willing of a third party, the State says it is not its affair, for the will of the actor is still free in the only sense in which there is such a thing as free-will.

This brings us to the root and test of our problem. It always brings us also to the matter of motive, *i. e., of guilt, and if there be no personal guilt of any of the actors, there is no wrong in the act.* Its consequences then become natural and normal consequences which society must endure like any other — like the consequences of human nature, human ignorance and human fallibility. These things legislation cannot cure, and these things no court can assume legislation was intended to cure — except on the theory that Government is an Earthly Providence — which is not the theory of our government. These are the roots of the "right to law" and "the life of the law."

Any other contention assumes the purpose on the part of Congress not only to introduce a new theory of the State and its functions, but a new theory of law — of jurisprudence — of legality — of the relation of the individual to society, and a new theory of the State in respect of that relation.

The burden of proof is on those who declare for the revolution.

If we do not confine ourselves to this principle and

to the very language of the Act read in the light of this principle, we open the whole theory of the State, of sovereignty, of law, of history, of economics, and make the construction of this statute the most far-reaching question that has ever been thrown for determination into our social and political life.

The Government would compel re-examination of not only what "State," "Law," "Legislation" are, but of what they can actually accomplish. We say there is no such duty on the court for we have got our juridical known quantities in the phrase "contract, combination, or conspiracy," and in these other terms.

Everywhere and always in our system — and it is this thing which distinguishes ours from the ancient and the mediæval systems, and is the very essence of our political liberties and the foundation of our industrial civilization — everywhere and always, we start from the freedom of the individual and the freedom of association, including the freedom to associate abilities and property, which are expressions of personality, quite as fully as the complete freedom of personal action, which is the general rule. Everything else is the exception. Under the ancient law this freedom was the exception; everything else was the rule.

The Act therefore cannot be assumed to infringe the right of association except where that right is exercised for the purpose of effecting a wrong, *i. e.*, the restriction or limitation of right here, as elsewhere, is the same (and not otherwise), namely, that a right may not be used as the instrument of a wrong — but the wrong must be definite and precise — something not only designed, but something recognizable, knowable, evitable. If the statute creates a new wrong it must truly perform the work of creation — which is not the declaration of a principle but the prohibition of an act, as, *e. g.*, when it prohibits carrying a concealed weapon.

But it is a rule also that in order that it may be submitted to the measure of the Constitutions, every limitation or deprivation of a right must be a distinct and definite prohibition of an act, not of its possible consequences.

And so we have got thus far, namely, that we are dealing with a statute which (a) either merely declares pre-existing limitations of freedom of contract or association, or, (b) decrees new limitations.

(a) If the first we have only to discover pre-existing custom and that accomplished our work is done. This consists in defining what already was the common law at the time it was declared by the statute.

(b) If the second we have to discover the new limitations in the words of the Act.

If we have to determine whether the purpose of the statute was to limit freedom of association in the name of freedom of competition and to secure so-called natural price, in disregard of the natural consequences of free competition — then we have to consider such questions as efficiency of legislation, legality of legislation, nature of competition, determinants of price, and the general policy of government — *i. e.*, to turn the court into both an economic and a legislative body.

We may say that the law has a meaning which makes it unconstitutional; or, that it has a meaning that reduces it to a nullity; or, that it has a meaning that makes it efficient within the scope of constitutionality, and the tradition of freedom of association.

The duty of the court is to say one of these things, and the last of them, if possible. We claim that this is possible, and that given such meaning the defendants have not violated the law. Every exercise of freedom of contract, of association or of agreement, which, no matter how the freedom is exercised, interferes wrongfully with the equal freedom before the law of every

one else to enter any calling or pursue any trade directly concerned with commerce between the States, or which subjects him to loss or injury not incident to competition as such, is forbidden.

This we take to be the principle of common law and the principle of modern justice, and which it was necessary to put into the form of a national statute for only one reason, viz., that otherwise its breach was not punishable by the Federal courts.

In decreeing that there shall be no *such* restraint through oppressive or malicious contracts or conspiracies, it does not decree that there shall be no " restraint " whatever, for all association implies restraint, and the right to associate is the right to restrain, but to restrain rightfully; and the Act did not mean to make " restraint " and " wrong " synonymous terms any more than it meant to make " combination " and " contract " and " wrong " synonymous terms.

In decreeing freedom the act meant only freedom from misuse of liberty, not from the consequences of freedom itself. If it meant that competition shall be free it did not mean free from its own proper consequences.

The combination which the Law opposes is always one which acts not by the usual psychological methods of social suggestion, of the natural contagion of example, but through organized constraint. One of the greatest of living authorities, Durkheim, characterizes the predominant social fact as " constraint." When any group smaller than the State attempts to exercise this prerogative of the State, the latter may step in and interpose its veto — but it does nothing of the kind so long as there is no element of constraint — no application of any kind of organized force or power. If all members of a trades-union through personal dislike of a certain employer were to refuse to buy his goods and each independently of the others were to dis-

suade purchasers — it would be an exercise of the right of opinion and there would be like action among all but no community of action; but as soon as the community of action is organized by combination, and constraint is the work of a group or combination, then the State resents this limitation of a man's liberties by the wrongful use by other men of their liberties. To organize for the purpose of imposing penalties, or to agree to penalize, *i. e.*, to punish, is an infraction of sovereignty, and that is what the law aims to discourage and prevent.

The Act isn't concerned with price — that is beyond its reach for economic reasons, the discussion of which would be foreign to this argument on our theory of the canons of construction, and moreover, because price legislation, positive or negative, is contrary to every American tradition.

The Act is not concerned with restraint merely, as a possible consequence, because that may be the result of the influence on the individual will, or on the judgment of an entire social group, of a perfectly legitimate act of an individual or group, but only with such restraint as results from a plan and a purpose.

The Act is not concerned with competition, for it cannot enforce it, and it cannot limit it, and it cannot deal with its consequences without denaturing it.

But what the Act is concerned with is group action to coerce, or compel, or prohibit individual freedom — as freedom is understood in law, *i. e.*, the final expression of that self which is the equation of all its determining motives — free of the improper activity of any other will.

It is the contract or the combination which is the substantive object of the law, and that particular kind of contract or combination which, as an abuse of right or power, is designed to injure another in his rights, as illustrated by the cases already decided under the Act of 1890.

Before proceeding further, however, we wish to focus the attention of the court upon the fact that in the statute the substantive " restraint " is never used as distinguished from the phrase " restraint of trade," and that the substantive " monopoly " is never used as distinguished from the verb " monopolize." We also wish to dwell upon the fact that in the paraphrases of the statute suggested by the government the substantive terms are " free competition," " natural law of competition," " control of business," and " tends to restrain commerce or tends to create a monopoly."

We may also here dwell upon the fact that although sections 1 and 2 of the Act are quite distinct, they are, nevertheless, in the judgment of the government, identical in meaning and purpose, except that section 2 applies to the individual and is distinctly punitive, while section 1 is not.

The analysis of these sections will clearly delimit the field of construction and will demonstrate that if we are to apply the rule that the intent of the legislation must be found in the legislation itself, we may not disregard a single word or phrase of this statute which read in one way squares with all of our notions of law, and is an evolution and development of a historic growth, while read in another way marks an epoch of revolution both political and juridical.

Each of the terms of the Act is a definite concept — substantive, or adjective,— precisely as the paraphrases of counsel for the government are definite concepts, and it is no more possible to proceed further with the determination of their meaning without specific reference to each and all of them, their interdependence and their effect upon each other, than it would be to solve a problem in mathematics without

knowing what were the constants, what the variables and what the functions of any given combination of constants and variables. This is the only possible scientific method and any departure from it through neglect of any single factor is necessarily to falsify the conclusion.

This leads directly to taking up each term in its turn and while discussing it, to discuss it as well in its relation to the other terms.

XVII.

RESTRAINT OF TRADE DOES NOT MEAN ANY OR EVERY RESTRAINT, BUT A PARTICULAR RESTRAINT AND, AS HELD BY A MAJORITY OF THE COURT IN THE NORTHERN SECURITIES CASE, AS MEANING AN UNREASONABLE RESTRAINT.

In the first section the determinants of the phrase "contract, combination and conspiracy" are "every" and "restraint of trade." Every restraint of trade produced by either of several methods is illegal. The restraints of trade must be only restraints every one of which is prohibited, so that if there be any restraint which is not prohibited then either "every" must be disregarded or "restraint" must be given such definition as gives vitality and meaning to "every."

Now it is at once apparent that if the historical and technical use of the phrases "contract, combination or conspiracy" or "restraint of trade" and their constituent words, be adopted as the meaning of Congress, the difficulty is at once resolved, for "every" can then be used without hesitancy and without any necessity for subjecting it to exception, and all that would then remain would be to determine what is meant technically by the phrases used.

But if any other meaning of these phrases or their constituents be assumed, it at once becomes necessary to see if in such sense Congress could possibly have

meant " every." If we are to depart from the fixed technical and historical meaning of the phrase, and the words in the phrase, in which sense they or their precise equivalents have been used in our jurisprudence for centuries, we must either construct some new definition, or fall into the complete indefinition of colloquialism; and just as it is certain that " every " may be used with the historical phrase, so it is certain that it can not be used with colloquial phrase.

To avoid the adoption of this principle the government has had recourse to the usual alternative, viz., paraphrase, which merely shifts the field without resolving the difficulty — the old practice of defining a thing by its synonym or re-defining it in terms of itself — or asserting it to be something which analysis may prove it is not, or deliberately laying it aside and substituting phrases such as " extinction of competition " or the " prevention of the play of competition."

But to begin with everything which interferes with the trade of others, which reduces that trade, is not a restraint of trade. " Trade " is a generic term, and it is so used in the statute. It is one thing and " my " trade, " your " trade or " his " trade are entirely different things. Every act of trade is an exclusive act — precisely as my use of the road is exclusive at the time I use it and so far as I use it, and yet while it affects travel is no restraint of travel. An individual has such a reputation for the quality of his goods, and his ability is so far realized in economic production, that his competitors within a given radius are compelled to go out of business. This is not only a restraint but a destruction of the trade of certain individuals, and yet it is no restraint of trade, as such, and the number of transactions and the money value of the exchanges within the trading radius may be vastly increased so that the result is the promotion of trade,

although the trade of Matthew, Mark, Luke and John may have been restrained to the point of extinction, and this as the very result of that " rule of free competition " which is appealed to as the antidote for " restraint of trade."

This is the history of the great department stores against which the outcry of restraint of trade is constantly raised by small tradesmen. Now we ask if two individuals with large capital form a partnership for the establishment of a great department store which may occupy two whole city blocks and in the shadow of which no smaller or less economic organization can live — is that a restraint of the kind prohibited? And if the owners of these great shops for the realization of still greater economies, the reduction of price, the stimulation of consumption and the enlargement and promotion of trade as such, consolidate their businesses by contract in any form, is that enlargement of trade a restraint of trade because it discourages the trade of Matthew, Mark, Luke and John, who are still living in the past and striving to perpetuate the past? If not, then it is certain either that " every " is inapplicable or " restraint of trade " does not mean *any* restraint of *any* trade.

Thus one or the other term must give way, or they must be accommodated and made vital by definition; *i. e.*, the statute must mean every restraint of *a certain* kind, *not every kind of restraint.* This is obvious but it has not yet been recognized by this court that it involves and implies the necessity for some specific definition. If the phrase is to be read as it is written, " every restraint," meaning thereby " every restraint of a definite kind," we have one set of consequences; whereas, if it is to be read " every kind of restraint," we have an entirely different set of consequences.

What the result of the latter theory would be is best illustrated by the fact that, as has been repeatedly pointed out, it would render obnoxious to the law precisely what this court has never held to be obnoxious to it.— *e. g.*

" organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business or of maintaining wages;

" the formation of a corporation to carry on any particular line of business by those already engaged therein;

" a contract of partnership or of employment between two persons previously engaged in the same line of business;

" the appointment by two producers of the same person to sell their goods on commission;

" the purchase by one wholesale merchant of the product of two producers;

" the lease or purchase by a farmer, manufacturer or a merchant of an additional farm, manufactory or shop;

" a sale of a good will of a business with an agreement not to destroy its value by engaging in similar business."

This is the list originally given by Mr. Carter in the argument of the *Joint Traffic Association case,* as summed up by Mr. Justice Peckham in the opinion of the court at page 567 of the report. It seems needless to add to it and yet there are a few other cases which justify us in enlarging the list:

Chambers of commerce, boards of trades, etc., exchanges that prescribe rates of commission and compensation for various services;

a farmer's or workingman's co-operative purchasing association which restrains, in the sense of reducing or

limiting, the business of local tradesmen and *quoad hoc* puts an end to competition among buyers:

a joint purchasing contract for the purchase of raw material by manufacturers;

a department store owned by a corporation and doing a money order business;

a bar or medical association fixing a standard of professional ethics;

an agreement between two or more persons which makes it more difficult for a third person to remain in business in competition with them;

an improvement, as the result of contract, in the technique of business which has the effect of " scrapping " all less perfect technique —

such a reputation for cheapness and quality as make competition not impossible but impracticable;

and what, for instance, is the legality of the following suggestion of the Secretary of Agriculture in his annual report of December, 1910:

" It is plain that the farmer is not getting an exorbitant price for his products, and that the cost of distribution from the time of delivery at destination by the railroad to delivery to the consumer is the feature of the problem of high prices which must present itself to the consumer for treatment.

" Why do not consumers buy directly from the farmers? A distribution of farm products in this simple way has already begun in England, where co-operative organizations of farmers are selling by direct consignment to co-operative organizations of consumers in cities. Farmers' co-operative selling associations are numerous in this country, but co-operative buying associations among people of cities and towns are few. Aside from buying associations maintained by farmers, hardly any exist in this country. It is apparent, therefore, that the consumer has much to do to work out his own salvation with regard to the prices he pays for farm products."

In a word, any manifestation of economic progress which restrains or ultimately determines the volume or extent of any one's business, on the theory that the right to the maintenance of the *status quo* is imprescriptible in everyone and is protected by the statute.

Now it is asserted that Congress did not mean and the Act did not mean any such absurdity, any such gospel of stagnation, or any such limitation of the natural right of combination or of growth.

This was so clear to this court that Mr. Justice Peckham held in terms that the restraint referred to in the Act did not mean certain of these things, although, as he said, the illustrations were hypothetical only, and none of those issues were involved in the case then at bar. But the principle of every one of these illustrations is involved in the case now at bar and their consideration is no longer evitable.

And so we are brought back to the meaning not only of "restraint" but of the particular phrase "restraint of trade." The technical and historical meanings are demonstrated by Mr. Justice Holmes, and by our reference to the history of the legislation on the subject. Is it any kind of restraint, meaning adverse effect upon any kind of trade done by any one, or upon any general class of trade in any place whatever, at any time and under any circumstances without reference to the form of contract or combination, and without reference to the actual design or motive of the parties?

If it were the purpose of the law that the phrase "restraint of trade" be broken up instead of being used as a single term, we at once find ourselves involved in entirely novel considerations of the greatest magnitude, because the word "restraint" as the subject of trade without any limitation, becomes the subject-matter of the legislation, and we have to seek the

meaning of " restraint," to give it some specification, some definition, or to accept it in its colloquial and popular meaning or meanings in which, as is characteristic of all popular speech, there is no definition. We dwell upon this difficulty now because we shall encounter it again when we come to deal with " combination " " monopoly " and " competition " and "tendency " and " power," in fact with each of the words which have been woven into the texture of the government's contention, but which, without definition, leave it really impalpable and imponderable — the language of sentiment but not of law. Does the statute mean every kind of restraint of every kind of commerce — " commerce " meaning all intercourse and " restraint " meaning any of its synonyms, " abridging," " checking," " restricting," " circumscribing," " hindering," " keeping down," " repressing," " hampering," " affecting the course of," "suppressing," " arresting," " limiting," " constraining," " contracting," " lessening," " discouraging "?

The government contends that it means any and all of these things and this contention if sound leaves it in control of practically the whole range of our national economic life *without the necessity for any further legislation.*

Our conclusion is that so far as concerns the word " every " in the first section it can only preserve its meaning of complete inclusiveness if applicable to an ascertained and defined kind of " contract, combination or conspiracy " which in turn has an equally well defined end, namely " restraint of trade ".

Differently stated to save the word " every," we are compelled to define first, " contract, combination and conspiracy," and second, " restraint of trade," and we have already sought to do this in such manner that every word in the section may be of full force and

value and the section as a whole clear, explicit and effective.

If we are right in our contention there is no necessity to go further at this time and construe " competition " and " tendency," which are not used by the Act, but may at once pass to the consideration of the next substantive and controlling phrase used in the Law itself, before discussing the meaning, value and propriety of the different paraphrases substituted by the government. Consequently we next deal with the words " monopolize or attempt to monopolize * * * any part of trade or commerce " which involves the central point of contention and difficulty under the second section.

XVIII.

THE PRINCIPLES OF DEFINITION AS APPLIED TO THE WORD "MONOPOLIZE."

Up to this point we have devoted ourselves to the construction of the first section of the Act alone, and without any discussion of one of the fundamental principles of construction, to which we now feel it necessary to call the attention of the court, because the definition of the word "monopolize" becomes peculiarly difficult unless we have an especial regard for the very meaning and nature of "definition" as such.

We always suffer, as Mr. Oliver has remarked in his life of Alexander Hamilton (pp. 28-29) from "the constant danger that intelligence may be brought under the domination of words. * * * It is a rare quality in any man, but more than usually rare in lawyers, never to allow words a part in completing the fabric of an imperfect thought." We may also recall the quotation from Bacon which we have already made.

One of the greatest authorities of our time, in discussing words as instruments of accurate and logical thought has said:

"In naming we are always under the influence of the language that is already there. The language in use hinders combinations which would naturally take place and forces upon us others which would not. To declare the common element in all the things which langage denotes by one word is a very different matter from declaring what things any individual subsumes under the idea which he considers they resemble." (Sigwart's Logic, p. 49.)

Now all properties by which monopolies as a class of determinate logical concepts may be defined must include for generic purposes some terms of the class, although for specific purposes they may neglect others.

The legal definition of this particular term, like that of every other which is an instrument of policy and justice, must be wisely and justly delimited for purposes not only of inclusion but of exclusion. It must not be the result of an arbitrary determination indifferently to use a common or untechnical term in a technical and uncommon sense, nor to use a word, which by virtue of law becomes of the highest technical importance, in a vague colloquial and shifting sense and above all in a sense determinable by potential consequences, which consequences in their turn become dependent upon the potential meaning. This is precisely the thing that vitiates the logical coherence of so many of the decisions which deal with the law of monopoly and render the law itself as shifting and indefinite as the popular use of the term that gives it its title.

A judicial exposition of the meaning of any such term, and much more, its actual judicial application in a given case, must be the result of a logical scientific analysis of the implications of the term in its ascertained powers in the particular field in which it is to be applied. For juridical purposes its eloquential use must be wholly disregarded unless jurisprudence itself is to become mere eloquence.

Even in the discussion of indefinables (of which we claim monopoly as not one) there is still a duty to endeavor to see clearly and to make others see clearly the entities concerned in order that the mind may have that kind of acquaintance with them which it has at least with the irreducible concepts of consciousness, which are the broadest of all terms (see Russell, Principles of Mathematics, Preface, 1).

The connotations or attributives of that substantive term " monoply " react on it, and so our task is to find out not whether the act aims at all monopolies indifferently and abstractly, but what quality or character in them it aims at, so as to define and identify the concrete monopolizing which it prohibits. We assert that it is distinctly the element of unlawful aim or purpose, explicit or implicit. With this as the guiding principle we cannot go astray and we work neither revolution nor dislocation in the *corpus juris,* but a projection and application of the traditional and irrepealable principles of justice.

" When a term of thought owns and emphasises its solidarity with others, when it is not circumscribed to a single relation, but becomes a focus in which a variety of relations converge, when it is placed in its right post in the organism of thought, its limits and qualifications, as it were, recognized and its degree ascertained,— then that thought is rendered ' concrete.' A concrete notion is a notion in its totality, looking before and after, connected indissolubly with others; a unity of elements, a meeting-point of opposites. An abstract notion is one withdrawn from everything that naturally goes along with it, and enters into its constitution." (Wallace's Prolegomena to The Logic of Hegel, 2d ed., p. 304.)

The applications of law are after all only a process of social numeration, bringing one or another citizen under the classification of a rule, not under a haze, an atmosphere, a belief or a vague group of colloquial meanings. It is a numbering under a class.

The statute says every and all, but " the plural is only a systematic function of the singular "; and the every and all have no meaning until we have discovered what the singular is, and here the singular is a kind of contract or combination. It is neither a restraint nor a monopolizing. The " all " and " every " simply mean an endless reduplication of the one, *i. e.,* of the " contract," or " combination " for the definite

purpose. These words are the common denominator, and we have heretofore been led astray by regarding something else as that denominator and then accepting a paraphrase as a definition — a rendering uncertain instead of a making certain. And yet the isolated word only gets life and individuality in its context. "The mere word seems a simple thing, and one is at first disposed to get rid of its difficulty by substituting a so-called synonym. But a deeper study reveals that an exact synonym is a thing one can no more find than two peas which are absolutely indistinguishable. A synonym is only a practical *pis aller*. But every word is really, as it were, a point in an infinitely complex "organic life." (Wallace *op. cit.*, p. 308.)

Thus we are compelled to seek a concrete specific thing, *i. e.*, we are compelled to define. Definitions and descriptions are classified as follows and we are compelled to define within one of these classes:

"(1) A definition complete and final.

(2) Complete (so far as we know), but provisional.

(3) Incomplete, but sufficient to distinguish the term defined from all others terms.

(4) Incomplete, but sufficient to distinguish the term defined for the special purpose in hand.

(5) A description only, but sufficient to distinguish the term described from all other terms.

(6) A description only, but sufficient to distinguish the term described for the special purpose in hand.

"Any pretended definition or description which does not fulfil one of these conditions must be rejected as having no value whatever." * * *

"The rules for a legitimate definition must depend on the kind of definition which we purpose or are compelled to employ. The following rules are common to the three first kinds of definition enumerated above:

"1. The definition must be *convertible* with the term defined, i. e., it must apply to every object denoted by the term defined, and to no other objects.

"2. The definition must consist of one common term or abstract term employed as a common term

(the genus), and of one or more attributives (the differentia or differentiae).

"3. Each of these terms, constituting the definition, must connote less than the term defined; otherwise, they afford no explication of it.

"4. Each of these terms must have a connotation distinct from that of the others; otherwise, the definition will be redundant." (Fowler's Logic, p. 54.)

If we think of a definite thing we *must* think of it as possessing attributes, which inhere in it and constitute its *particular* nature, and can be *predicated of it without reference to anything else,* (see Sigwart's Logic, I., p. 38); that is to say, without reference to its foreseeable or unforseeable *consequences,* or to any theory as to the *tendency* of those consequences, or to any theory as to the place of those consequences in the reticulation of life, particularly where, as we shall show later on, as in the case of the term "monopoly" there is the widest divergence of opinion as to what its consequences really are. Every individual thinker has a view of his own, that view being determined generally by his point of departure, which in every case, must necessarily be adopted in ignorance of some of the facts.

As a consequence we must seek the essential and constituent attributes of a term, jurally used, in complete disregard of the reasons growing out of an assumed consequence theoretically determined, and we must, moreover, disregard all of its collateral, correlative and figurative uses. If we do otherwise we make every statute elastic beyond its purpose, and invest it with the possibilities of endless mischief.

The fundamental difficulty with words (which in a legal system must have a general meaning of universal acceptance and application and not a series of special meanings and special applications) is,— again to quote Sigwart,— because

" ' Every object of which we form an idea is thought of in one or two ways. We may think of it as having particular existence (i. e., existing as a particular Thing, or as an Attribute, activity or relation of particular things) or as subject to the conditions of particular existence * * * or we may think of it without attending to its particular existence, and as general in the sense that as mentally represented it may enter into the thought of any number of things or instances. This mental representation finds its expression in the *Word as such.* But when words are appropriated from existing language and employed to express the natural thought of the individual their meanings differ with the individual and are liable to great transformation. * * *

" ' What language aims at is that a word should have the same meaning for everyone; but in actual life this is far from being the case. It is more true that words have different meanings for different people and for different persons at different times. Hence in the analysis of actual judgment we must never start by assuming that a word has a generally accepted meaning without further investigation; we must always regard the word as being merely the sign of the idea present to the individual who is making the judgment.' " * * *

" Words are generally held to be signs of *concepts.* But a concept in the logical sense is a word of art, produced by a conscious elaboration of our ideas in which its characteristics are analyzed and its definition fixed. * * * We must be careful to distinguish between the generality of the *idea* and the generality of the *word.*" (Sigwart's Logic, 40, 41, 42, 47.)

" *Throughout philosophy we do not seek merely for correct, still less for plausible definitions, whose correctness appeals directly to the popular imagination; we seek approved or verified definitions, the content of which is not assumed merely as given, but is seen and known to warrant itself.*" (Hegel, Logic, Wallace's translation, 2d ed., p. 186.)

" When the object has been in the first instance brought by cognition into the form of the specific notion in general, so that in this way its genus and its universal character or specialty are explicitly stated,

we have the *Definition.* The materials and the proof of Definition are procured by means of the Analytical method. * * * The first question that definition suggests, is where it come from. The general answer to this question is to say, that definitions originate by way of analysis. This will explain how it happens that people quarrel about the correctness of proposed definitions; for here everything depends on what perceptions we started from, and what points of view we had before our eyes in so doing. The richer the object to be defined is, that is, the more numerous are the aspects which it offers to our notice, the more various are the definitions we may frame of it." (Hegel, *op. cit.,* pp. 366, 367.)

"When we have to do with adjectives and verbs it is not only shorter but more correct to give them their proper place in the grammatical structure of the definition, and to let them bear plain reference to their subject, seeing that it is only as expressing states or properties of a subject that they have any meaning. * * * Names are handed down to us which have become part of our language, though their meaning has never been precisely fixed. Thus we speak of virtue and sin, of good and the highest good, of appearance and reality, with a full conviction that we mean something very definite by these names, and ready to draw important inferences from them in reference to that to which we apply them. But at last the difficulties in which we entangle ourselves convince us that strictly speaking we did not know precisely what we meant, that we had not completely fixed the conditions which must be satisfied in order to justify the application of these names, that we had in short trusted to hazy ideas, the clearing of which is of the very first importance." (Lotze's Logic, I, pp. 220 and 223.)

So the courts must have an identical basis for judgment and an identical meaning for the same term at the same time and as applicable to all cases. *In law, if there is to be law at all, by law meaning a principle or rule of uniformity, the word must mean the same to legislator, to the court and to all members of the court,*

and to the person, or of thing, to which the law is to be applied. It is imperative that it should have a meaning not only, but only one meaning, no matter what the implications of that meaning may be — a definition and not a description.

If a new crime or a new illegality is to be established and to be designated by the use of a given word, then it seems that Mr. Justice Holmes' proposition that these words must be given a definite meaning is unanswerable. But a definition once having been reached, *i. e.,* a definition which, though generic, is nevertheless clear, such as tort, crime, process, evidence, proof, homicide, burglary, larceny, commerce, negligence, heir, property, penalty, tax, assessment — we are no longer involved in the performance of a double task in every case, *i. e.,* in making the law simultaneously with the determination of the facts; or with the reinterpretation of terms to fit the facts and then the settlement of the facts to fit the reinterpretation; but are, quite to the contrary, and as law *qua* law implies, confronted with the straightforward, though possible difficult, problem of the determination of the fact and nothing more.

There be those who assert that the word " monopoilze " has no " technical, scientific or legal meaning as distinguished from its popular meaning," but no matter how strenuously contended, this is demonstrably impossible inasmuch as *the word has no definite popular meaning but very many popular meanings,* as many almost as the words " right " and " wrong," some one, and not every possible one, of which, must have been meant by the statute. *If the theory that there is, and should be, no legal meaning, were to prevail, then we not only have a penal statute which is not specific and not to be strictly construed because it cannot be strictly construed, but which is subject to new appli-*

cations daily, in every case and by every judge, dependent upon what he may at any time regard as the popular meaning at that time — all of which is equivalent to saying that justice shall be arbitrary. But it is a rule of law that terms which have been used technically and historically, like " restraint of trade " and " monopoly " shall not be used at all in their popular meanings unless there be a statutory provision to that effect. We have a precise illustration of this in the statutory provision of some States for the alternative uses of the words " heir," " devisee " and " distributee." If they are to be used at law in the popular sense as interchangeable terms, then the law itself must so provide.

To illustrate more fully, if such illustration be necessary, let us consider words of broad and popular colloquial meaning, such as " law," " right," " justice." Suppose Congress were to pass a statute saying " every act of injustice is illegal and shall be punished by a fine of not to exceed X or imprisonment not to exceed Y,"— unless the word injustice itself were delimited by the courts the latter would become absolutely arbitrary, the whole field of criminal legislation would be turned over to the judiciary, to avoid which it would be necessary to find some meaning other than any man's meaning or every man's meaning of the word justice.

Now that is precisely the case here, and consequently we insist that definition must be arrived at in conformity with the principles which we assert, and this, notwithstanding difficulties which are much more apparent than real. We clearly recognize the distinction between the necessity for definition in substantive terms and in adjective qualities. This necessity is well illustrated by the use of the word " unconscionable " in the English Money Lending Act of 1891 and by the use in the German Usury Law of 1893 of the

following phrase: "exceeding the usual rate of interest in such a way that the profit seems out of proportion to the service rendered," just as in our own common law we constantly use the words "reasonable" or "unreasonable." But the substantive or primary concept to which these adjective terms such as "unconscionable" or "unreasonable" are to be applied must always be definitely ascertained, *particularly if the term may be used not only as a term of action but as a term of status.* To illustrate the full meaning and purpose of definition it is impossible to do better than to quote the words of the greatest jurist of the last century, the late Rudolph von Ihering, used in the first chapter of his Geist des römischen Recht. (The italics are our own.)

"This conversion of rules of law into juridical definitions is precisely what differentiates scientific development and intuition of law from its exposition in the code. The legislator may confine himself to expressing his purposes in their original and immediately practical form. Science on the other hand has no mission except that of explaining and co-ordinating these purposes. It ought also to reduce them to logical elements of its system. * * * Science, in place of an innumerable mass of the most diverse rules obtains a determined number of simple bodies, by means of which it can recompose when it pleases each of the rules of law.

"Simplification is by no means the only advantage which this analysis presents. *Definitions arrived at in this way are not simply decompositions of proposed rules of law by means of which we can reconstruct these rules themselves; but this analysis has a much more precious merit in that it furnishes the possibility of developing the law by means of the law itself and of enlarging it by its own intrinsic powers.* The combination of different elements permits science to create new notions and rules. Juridical notions are fruitful, for they engender others. Rules of law as such have not this generative force. They are, and remain, themselves, until such time as they are reduced to their

simple elements and have thus been placed in an ascending line just as in the descending line are placed in their relations of descent from others; viz., not until such time as they may testify to their descent from other notions and in their turn create new notions drawn from their own proper bosom. * * *

Law appears to a trained eye as a logical organism of juridical institutions and definitions. To a less trained eye it appears only as a collection of rules. The first of these points of view includes the intimate nature of law, the second only shows that external superficial side which is consecrated to practical life."

Now there can be no better illustration of the precise danger of the failure of the court to apply the law of definition than the consideration of the different meanings and the different popular uses of the very words "monopoly," "monopolist" and "monopolize," some of which are now obsolete, some of which are still prevalent, and some of which are changing from day to day, as illustrated in our own and in other languages. What these are can be discovered only by a reference to the use of these words in the illustrations supplied by the lexicographers, the text writers, and the courts themselves. These illustrations we supply, in proof of our own theory in a very ample list of definitions and uses, in the Appendices. *It is the diversity of popular meanings which precisely emphasizes the necessity for a legal meaning.*

XIX.

THE WORD "MONOPOLIZE" AS USED IN THE STATUTE MEANS:—

BY ONE'S ACT—ALONE—OR IN COMBINATION—THROUGH ANY OF THE CATEGORIES OF LEGAL WRONG—IN THE EXERCISE OF ONE'S OWN FREEDOM TO TRADE—TO PREVENT—OR TO ATTEMPT TO PREVENT—OTHERS FROM ENJOYING AND EXERCISING—IN WHOLE OR IN PART—THEIR EQUAL LEGAL FREEDOM TO TRADE.

THE PROHIBITION OF "MONOPOLIZING" AS USED IN THE ACT DOES NOT LIMIT OR PENALIZE ANY OF THE LAWFUL INCIDENTS OF PROPERTY, POSSESSION, SUPERIOR LOCATION, CREDIT, REPUTATION, ABILITY, INTELLIGENCE OR KNOWLEDGE.

The meaning of all the minor terms of the Act must depend upon the meaning of the major term. The word "monopolize" dominates the whole of section 2 and if it be given one meaning, all the adjective terms may be preserved;— otherwise that is impossible. We must therefore find for the section such a meaning as permits the retention of the words "attempts," "every" and "any part of" and such *must* be the meaning of "monopolize" as used, *such* and no other, for that is the *one thing* that the section makes clear. It must not be "monopolizing" as an indefinite colloquial term, but as a fixed and definite legal concept — which limits the words "attempt," "combine," "conspire" and "any part of trade" just as in the

first section "restraint of trade" is the limiting phrase.

We can only get at the meaning of "monopolize" as a verb by a knowledge of "monopoly" as a substantive.

An examination of the definitions from the dictionaries and economic writers, which we have placed in the appendix, shows that the dominant idea of the word "monopolize" has always been the concept of singleness of control, and that that concept applies to every kind of monopoly not only of copyright and trade marks, which are guaranteed by the Constitution, and of franchises which are guaranteed by the Legislatures, but of monopolies which exist under general titles of the law, such as the monopoly of property in either land or capital, the monopoly of market which accrues from the sole ownership of a particular product, or the sole knowledge of a particular process, or the possession of reputation for capacity or honesty or ability, or from the possession, as antecedent to the right of property, of natural advantages in respect of location.

Of course the statutory monopolies are excepted from the Act of 1890. Was it meant that the common-law monopolies should not be?— because it must here be noted that the statute refers to *any attempt* in *any manner* by *any person*. It is therefore obvious that *every* implies some definition of monopolies. If it does not a man may not buy the sole deposit of a particular grade of ore. He may not enjoy the exclusive benefit of his trade name, or his superior abilities, or his superior knowledge, or his secret processes, or even of the superior esteem of his neighbors, if any of these things give him the control of his market and enable him to fix his price determinable by the quantity he can sell at such price as the public is willing to give.

There is no alternative — either " every " includes these, or the definition of " monopolies " excludes the " every." It must be such monopolizing as permits the preservation of the " every " — because the establishment of exceptions is judicial amendment of the legislation;— not its construction but its amendment.

It will be noted that the Act does not declare every monopoly unlawful — but punishes every person for any " monopolizing " or attempt at " monopolizing," meaning necessarily only such " monopolizing " as is contrary to the rest of the law.

We then have our limitation of monopolizing which makes the " every " possible in the implied term unlawful — *for whatever is implicit in a written instrument is actually in the instrument.* (*So. Carolina* v. *U. S.*, 199 U. S.)

So that our definition is now confined to monopolizing, which was illegal, and contracts which were unenforceable at the time of the enactment of the statute.

That means any abuse of one's own rights to the injury of the rights of others. There must be, not a use of rights only, but an abuse of rights to that end — that is, by conspiracy, fraud, false practices, deceit, coercion, oppression, bribery or any other act which itself is unlawful, in order to establish oneself as an exclusive seller or buyer — or to control the conditions under which sales and purchases can be made in any market great or small. It must mean this and nothing else, because otherwise it would not permit any of the lawful monopolies like those of trade name, superior reputation, brands, or a monopoly secured because of lowest price incident to superior location, skill or character or secret processes, or other lawful advantage. That is what was meant by the following declaration of the law in *Mogul S. S. Co.* v. *McGregor:*

" What, then, are the limitations which the law imposes on a trader in the conduct of his business as

between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely, is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. * * * They (the defendants) have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a prsonal intention to harm, it is sufficient to reply * * * that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade."

Under section 2 of the Act it is not the contract, combination or conspiracy which is made the offense, but the "monopolizing" by *any* means. The "person," individual or corporate, is the offender, and the offense may be independent of any combination. It may be a man's sole individual act. But it may not be *any* act of his but *some wrongful act* — not a use of his right of freedom of action but an abuse of it. The abuse must be proven, and if proven the intent

will be presumed. But the abuse must be in some known category of wrong. Where that cannot be proven there can be no punishment, otherwise there is an impairment of the exercise of right instead of the punishment of an abuse of right.

And this abuse may be shown by proving intent — without reference to accomplished result — or by proving acts which necessarily imply the intent.

It is therefore sufficient not only, but only possible, to define "monopolizing" as securing control of the whole or part of trade or commerce by an abuse of right or resort to wrong, and the section creates no new wrong. It merely recognizes common-law wrongs and adopts them as part of the Federal criminal law which was not the case prior to the passage of the Act.

This accomplishes the purpose of the Act and of public opinion — it enables the national government to do what it could not previously do, and as part of its right to regulate commerce between the State, to punish wrong-doers — where the same was previously impossible, because the common law of crime is not *qua* common law a part of the Federal law. It added the long arm of the nation to the short arm of the States, in punishing attempts to control commerce or any part of commerce, not by lawful but by unlawful means — what is unlawful and what is lawful being determined by the general principles of applied justice.

In this sense the section itself is efficient and is also harmonious with the rest of the statute. In any other sense it is meaningless and impossible of application except under conditions which violate the rights of life, liberty and property and all rights corollary to those rights. By this construction and no other can the efficiency and the constitutionality of the section both be saved.

"Monopoly" is a *condition* or a *result.*

"Monopolizing" is an *action* like every other crime.

and it is the *action,* and as an action in violation of some category of right, which is made criminal.

We consequently have the following definition which we have given above.

In this sense the second section of the statute perfectly complements the first, and "monopolizing" and "restraining trade" fall into the same categories, and are dominated by the same principle.

The motive of the statute is thus made unitary, and it results in neither an economic nor legal nor political revolution, nor in a general distortion of the *corpus juris,* but extends and makes efficient in the Federal sphere principles of justice which are as old as Anglo-Saxon jurisprudence.

The first section makes these categories of wrongs unlawful, and preventible by injunction, and affect the *condition,* that is, the "combination" or "trust." The second affects the *action,* reaches the *individual* as well as the groups and *makes guilt personal.* Thus all difficulties are removed and the statute appears as an instrument of justice and progress, instead of an act of revolution and an attempt to substitute a popular belief for an economic law and an historical evolution.

For these reasons we hold that the law was properly interpreted in the following conclusion of the United States Circuit Court by Circuit Judge Jackson, afterwards of this court, in *In re Greene,* 52 Fed. Rep. 115, as follows:

"It is not very clear what congress meant by the second section of the act of July 2, 1890, in declaring it a misdemeanor to 'monopolize,' or 'attempt to monopolize,' any part of the trade or commerce among the states or with foreign nations. It is very certain that congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or

control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns.

"A 'monopoly,' in the prohibited sense, involves the element of an exclusive privilege or grant which restrained others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public. As defined by Blackstone (4 Bl. Comm. 159), and by Lord Coke (3 Co. Inst. 181), it is a grant from the sovereign power of the state by commission, letters patent, or otherwise, to any person or corporations by which the exclusive right of buying, selling, making, working, or using anything is given. When this section of the act was under consideration in the senate, distinguished members of its Judiciary committee and lawyers of great ability explained what they understood the term 'monopoly' to mean; one of them saying: 'It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.' Another senator defined the term in the language of Webster's Dictionary: 'To engross or obtain, by any means,

the exclusive right of, especially the right of trading, to any place or with any country, or district; as to monopolize the India or Levant trade.' It will be noticed that, in all the foregoing definitions of 'monopoly,' there is embraced two leading elements, viz., an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein. It was certainly not a 'monopoly,' in the legal sense of the term, for the accused or the Distilling & Cattle Feeding Company to own 70 distilleries, and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the 70 distilleries, which enable the accused or said Distilling & Cattle Feeding Company to manufacture and control the sale of 75 per cent. of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products, by the enlargement and extension of business, was not an attempt to monopolize trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration."

XX.

IT IS NOT TRUE THAT CONGRESS HAS MEANT THAT "COMPETITION NOT COMBINATION SHOULD BE THE LAW OF TRADE;" OR THAT ANY OF THE FOLLOWING PROPOSITIONS ARE TRUE.

(a) "**Every combination which would extinguish competition is made illegal;**" or that

(b) "**The natural effect of competition is to increase commerce, and any agreement whose direct effect is to prevent this play of competition, restrains instead of promotes commerce;**" or that

(c) "**The constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition;**" or that

(d) "**Congress has in fact recognized the rule of free competition;**" or that

(e) "**In the judgment of Congress the public convenience and the general welfare will be best subserved if the general laws of competition are left undisturbed by those engaged in interstate commerce, and that as Congress had embodied that rule in a statute, that must be for all the end of the matter if this is to be a government of laws and not of men.**"

These contentions are a mixture of legal construction, economic theory, and a still further theory not

only of the constitutional but of the economic and social power of the legislative branch of the government.

Now if the purely jural method of interpretation is to be departed from, if the statute is to be controlled not by phrase but by paraphrase, if the purpose of the act is to be sought outside of the act, and to be based upon the exigencies of the government, and on theories of the economic necessities which underlies these exigencies — it is the government itself which is to be held responsible for the injection of these questions into the construction and application of the Act.

Just as we have considered " restraint of trade," " combination," " conspiracy " and " monopoly," because they are the words of the Act — just as we have studied their nature and meaning both juridically and historically — so we are now compelled by the insistence of the government and some of the courts, in precisely the same way to consider the meaning and the nature of the word " competition," which is sought to be substituted for the words of the Act, and which if so substituted must be understood with the same measure of precision and fullness as if in the Act.

In the case of the *Western Union Tel. Co.* v. *Call Publishing Co.,* 181 U. S. 92, the late Mr. Justice Brewer, speaking for the court, said:

" There is no doubt that • • • at common law every person has individually, and the public also has collectively, a right to require that the course of trade shall be kept free from unreasonable obstructions."

The duty of keeping this course of trade so free was left to the States until it was assumed by the Federal government. Thus, in *Leisy* v. *Hardin,* 135 U. S. 100, Chief Justice, speaking for the court, said:

" Inasmuch as interstate commerce, consisting of the transportation, purchase, sale and exchange of commodities, is national in its character, and must be

governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it indicates its will that such commerce shall be free and untrammeled."

In the case of *So. Carolina* v. *U. S.*, 199 U. S. 437, this court said:

"If we look upon the Constitution in the light of common law we are led to the same conclusion. All the avenues of trade were open to the individual."

In another part of the same opinion the court said:

"The Constitution is a written instrument. * * * It must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. * * * The language of the Constitution, as has been well said, could not be understood without reference to the common law."

We now insist that at common law both before the passage of the act, at the time of the Constitution and throughout our entire history, what was meant by keeping open the avenues of commerce, by keeping free the course of trade, was nothing more than the principle of equality before the law, and the prevention of the lawless abuse of the power to limit the right of the individual, all quite without reference to the economic law of competition. It had no reference to any limitation of the natural operation of the law of competition, which was to create economic inequalities of which the community as a whole is the beneficiary, although he who is identical in right but not identical in advantage, may have to readjust himself to the conditions and limitations of his own ability.

Among the rights sacred to our people from the beginning was the right of establishing new relations through contract, the right of association, of combination, of consolidation of capitals — in other words, the

right of economic growth as one of the results and consequences precisely of that freedom of the avenues of commerce to which the court refers.

In considering these propositions we are compelled to discuss the question whether the purpose of the Sherman Act was in fact to provide that "Competition not combination should be the law of trade." Under the contention of the government this is an absolutely fundamental consideration and as far-reaching in its consequences as the questions whether; first the Legislature sought to do the impossible; second, whether this court can construe its Act as an effort on its part to do the impossible; and finally and quite apart from these two questions, whether it was the purpose of Congress to abolish the right of combination, which is the fundamental principle of the historic evolution of the modern organization of society.

Such would seem to have been the policy of some of the States, notably the State of Texas, and that policy has been declared in the construction of the Texas Acts by this court, but it remains to say whether this court shall hold that the Sherman Anti-Trust Law is identical with the Texas law and that what it has said of the one is equally applicable to the other.

It is true that Mr. Justice McKenna, speaking for the court in his opinion in the case of the *National Cotton Oil Co.* v. *Texas,* says:

"It is certainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil. The foundations of the belief we are not called upon to discuss, nor does our purpose require us to distinguish between the kinds of combinations or the degree of monopoly. It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.' Its dominant thought now is, to quote another, 'the notion of exclusiveness or unity'; in other words, the suppres-

sion of competition by the unification of interests or management, or it may be, through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be ' unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expression in the Texas statutes, it has expression in the statutes of other States and in a well-known national enactment. According to them, competition not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest, and the power such unification gives. And that legislatures may so ordain this court has decided."

But it is to be remembered that this was a case involving only the Texas Anti-Trust Act, and so far as the opinion discusses the Sherman Act it is *dicta.*

Now our contention is that interference with freedom of competition is in law to be considered from the same juridical point of view as interference with, or restraint of, trade — that the rule here is precisely the same as that in the case of restraint of trade and monopolizing, and does not mean the attempt to substitute one rule of right or one economic order for another, but is merely the prevention and punishment of an abuse of right.

What we here mean is the doctrine laid down by Judge Sanborn in the case of *Whitwell* v. *Continental Tobacco Co.* as follows:

" If on the other hand it promotes or but indirectly restricts, competition, while its main purposes are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination or conspiracy in restraint of trade, (*we would interpolate — or in limitation of free competition —*) within the true interpretation of this act, and is not subject to its denunciation."

It is inconceivable that this statute is to be construed as the repeal of all acts of combination which in any manner affect a competitor to such an extent as to make his competition unprofitable, and therefore to necessitate his readjustment to the conditions of life as predicated upon his own incapacity as a productive factor in the national life. The means for determining who and which is the most productive factor is competition itself, and competition cannot be limited by the consequences of its own nature, which make for the welfare of society as a whole after having given each individual his legal equality of chance.

This is exactly what is meant by the following extract from the opinion in the *Mogul S. S. Co.* v. *MacGregor*:

" The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company limited, is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former.

There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause — is evidence — to us a technical expression — of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible — would be only another method of attempting to set boundaries to the tides."

This statement of the facts very clearly presents the difficulties involved in the antimony between the perfect application of the doctrine of *laissez faire*, which means the unimpaired right of the fittest to survive to the end that all may benefit thereby, and not the right to survive by disregard of the principles of justice, whereby all must suffer.

The difficulty for society is to find not only a standard of fairness and reasonableness, but to enact this standard into a statute and thereafter to interpret the statute itself. It seems that the standard must be a wholly natural one and cannot be imposed by legislation any more than the law of the legislature can be substituted for the law of nature. This is clearly brought out in the consideration of the identical subject by the House of Lords in *Mogul S. S. Co.* v. *MacGregor*, L. R., 23 Q. B. 598, and in the case of *Martell* v. *White*, 185 Mass. 255. In the *Mogul S. S. case* Lord Chief Justice Bowen said:

"But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case, is said to have been 'unfair'. This seems to assume that, apart from fraud, intimidation, molestation or obstruction, of some other personal right *in rem* or *in personam*, there is some natural standard of 'fair-

ness ' or ' reasonableness ' (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and, I think, with submission, that there is no sufficient, reason for such a proposition."

In *Martell* v. *White,* 185 Mass. 255, the court said:

" The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed, in his business, to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or, in the words of Brown, L. J., in the Mogul Steamship Case, *ibi supra,* may adopt the " expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to reap a fuller harvest of profit in the future.' In these and many obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others; and, so long as he keeps within the operation of the laws of trade, his justification is complete."

And speaking upon the same point Lord Chief Justice Bowen remarked:

" To say that a man is to trade freely, but that he is to stop short at any act that is calculated to harm other tradesmen, and which is designed to attract business, to his own shop, would be a strange and impossible counsel of perfection."

and yet, if the contention of the government be correct, and limitation of competition be identical with restraint of trade, and all restraints be forbidden by the act — such will be the precise consequence. It would mean that the act, instead of being an effort at the establishment of justice and of true competition, is an effort against nature to establish economic equality, with the result, in the domain of consequences, that the natural inequalities of health, strength, integrity, diligence, ability, providence and capital, and the right of

the association of these, are to be legislated out of existence, and that the Act of 1890 is a purely socialistic statute designed to bring about the reign of social equality upon the basis of the minimum of social fitness. It means that the statute would be aimed to accomplish precisely what Helvetius meant when he desired to suppress money because it "facilitates inequality of fortune," and what Robert Owen meant when he described competition as the "root of all evil."

Congress may or may not have been aware of the danger of the use of the words "free competition" or of the substitution of the idea of the "limitation of free competition" for "restraint of trade" and "monopolizing," but it certainly used the latter words instead of the former, and in construing the Act we are bound to assume that it was guided by the counsel of experience and wisdom and did not conceive that by paraphrase the courts would enter a path which apparently it did not dare to tread.

The Act may be so read as to mean the prohibition and punishment of acts, either of an individual, or of individuals in combination, designed to interfere with the freedom of others, *i. e.*, to impair the like right of others. The government however, and some of the courts, seem to be of the opinion that Congress was legislating not in the spirit of the times and in the spirit of actuality, but in the spirit of Adam Smith, of whom it has been said "What he thought he was going to establish was the free competition of equal industrial units; what he was in fact helping to establish was the free competition of unequal industrial units. This was the disastrous oversight." (The Industrial Revolution, Arnold Toynbee, p. 17.) There is nothing in the statute to indicate that it intended to reverse the natural consequences of the competition of unequal industrial units because it restrains or puts out of competition those units which are not equal to

the performance of their social duty from the point of view of the highest national and social welfare.

There is no more popular superstition than that competition is the life of trade, because the life of trade is only that competition which eliminates the weak competitor and gives the market to him who gives most to the world. This was the principle which determined the decision in the case of the *Mogul S. S. Co.* v. *MacGregor* and was equally recognized in our own courts in the case of *Bonsack Machine Co.* v. *Smith,* 70 Fed. 388, in which the court said:

"Competition, it is often said, is the life of trade, but the object of all competition is to drive out other competitions."

It is a fact recognized by one of the earliest English economists, William Thompson (1827) (see Menger, Right to the Whole Product of Labor, lxi) that "Individual competition is incompatible with equal remuneration, as it is also with the securing to labor the entire products of its exertions." This is the reason for the combination of workingmen to limit the unrestrained law of free competition so far as it affects labor prices, this right of combination being itself a natural and necessary corollary of the law of freedom in competition which, if unrestrained, means competitive anarchy. The recognition of this aspect of competition is implicit in the definitions given by Marshall (Principles of Economics, p. 5) in his analysis of competition and its relation to co-operation and combination:

"The strict meaning of competition seems to the racing of one person against another, with special reference to bidding for the sale or purchase of anything. This kind of racing is no doubt both more intense and more widely extended than it used to be; but it is only a secondary, and one might almost say, an accidental consequence from the fundamental characteristics of modern industrial life.

"There is no one term that will express these characteristics adequately. They are, as we shall presently see, a certain independence and habit of choosing one's own course for oneself, a self-reliance; a deliberation and yet a promptness of choice and judgment, and a habit of forecasting the future and the shaping one's course with reference to distant aims. They may and often do cause people to compete with one another; but on the other hand they may tend, and just now indeed they are tending, in the direction of co-operation and combination of all kinds, good and evil. But these tendencies towards collective ownership and collective action are quite different from those of earlier times, because they are the result not of custom, not of any passive drifting into association with one's neighbors, but of free choice by each individual of that line of conduct which after careful deliberation seems to him the best suited for attaining his ends, whether they are selfish or unselfish.

"The term 'competition' has gathered about it evil savours, and has come to imply a certain selfishness and indifference to the well-being of others. Now it is true that there is less deliberate selfishness in earlier than in modern forms of industry; but there is also less deliberate unselfishness. It is deliberateness, and not selfishness, that is the characteristic of the modern age."

If the statute be construed according to the government's contention, it means a limitation without regard to the principles of justice, of the very freedom of competition for which the government contends, and the consequences of this would be disastrous.

It is now generally agreed that in an absolutely open market where competition is free, price is determined by those who produce under the most favorable circumstances, and is therefore reduced, whereas, if competition be interfered with to such an extent as to deprive those who produce under the most favorable circumstances of their natural advantages, that then price is determined by those who produce under the most unfavorable circumstances, *i. e.*,

that prices have a tendency to be maintained at a point which will yield a return, at the cost of society at large, to the least ably equipped in plant, capital, credit or intelligence. To insist therefore on a regime of small industries is to insist on a continuance of a state of affairs which must tend to limit instead of develop the increase of social wants and to maintain the incompetent or ineffective at the cost of society as a whole.

By virtue of its very nature every act of competition has the purpose, *quoad hoc,* of eliminating competition, and *the contention of the government in behalf of free competition amounts in its logical ultimate to the prohibition of competition; and with only one possible result, that such competition as shall be preserved shall exist at the will of the government and be subject to governmental selection. This is to place the government in the position of supremacy in the activities of commercial life, and once and for all to repeal the principal of freedom, out of which our national greatness and social prosperity have developed. For competition is not only action, but action and reaction, and the only real agent would be the government. It would really amount, among other things, to the extinction of that attribute of property which is advantage.*

Even a trained statistician admits that, " the manifold workings of the law of competition and the influence of association are generally too subtle to be measured by statistics " (Mayo-Smith, Statistics and Economics, p. 355). The fact is that the government and the courts are utterly confused in their effort to substitute " competition " for " trade " or " commerce," by way of paraphrase, in the language of the statute, and this is due to the very nature of competition itself. The Government insists on the maintenance of freedom to compete — and then intervenes against the more successful competitor, and prohibits (assuming the

theory of the government to be correct) new methods which strengthen one competitor against another. The real question which underlies the controversy is at what point and from what motive has Congress by its legislation, or have the courts by their construction, interfered, or sought to interfere, with the operations of the natural law of selection, quite apart from the law of justice, both of which leave the incompetent and the disqualified in a position of disadvantage?

Nevertheless modern society, so far as its legislation is concerned, has never recognized unlimited license of contract. It is a fundamental principle of the law of contract that the expression of the will of the individuals in the form of a contract which so far as concern those individuals society will adopt as the expression of its own will — must be within the will of, and satisfactory to, the community, as well as within the will of the contracting parties and satisfactory to them.

At no time, and in no civilized community, has the doctrine of *laissez faire* been absolutely approved or applied. Viewed historically, it is a mere theoretical dream of the economists. There never has been an organized community which has hesitated to set aside, even to punish, contracts which, from the point of view of the community as a whole, were regarded as immoral or antagonistic to the common weal. The fact is that it is precisely in modern times, and during the last half century, that there has been most legislation limiting the right of the individual to do as he pleases. For instance, police laws with regard to factory construction, with regard to child labor, with regard to the hours of labor, with regard to compulsory education. Our courts and our legislators do not stop to realize to what an extent legislation, and particularly legislation fixing the relations and affecting the pursuits of the people,

is a novelty; its most marked characteristic is its modernity.

Speaking of this, Mr. McKechnie, in his "The State and the Individual," says:

"Legislation, as it is understood in nations like England of to-day, is clearly a modern institution. Yet the germs of the principle it embodies were contained in the rudest beginnings of the State. Even when the reign of *laissez faire* was most undisputed, traces of legislative control were not wanting, while during the period of *status*, neither contract nor conscious law-making was altogether absent.

The correction of the doctrine of *laissez faire* is the application of the principles of justice to the limitations of economic freedom in precisely the same way in which these principles are applied to this limitation in all other relations of men. Where these principles of justice are not impaired, and where as a consequence there results such a limitation of competition as works injustice to none and benefit to all, then the motive for the intervention of the State entirely disappears.

"Man may love his fellow well enough to die for him, he does not love him well enough to work for him * * *. Competition kills competition * * *; this aphorism may be taken for a definition, how then, is competition ever to be universal. Moreover, were it admitted that competition does not yet exist in its full integrity, it would prove only that competition does not act with the whole power of elimination inherent in it; but that would alter nothing of its contradictory nature. *Why need we wait thirty centuries longer to learn that the more competition develops, the more it tends to reduce the number of competitors* * * * prevent it or let it alone, there you have the two eternal alternatives of the economists; their genius can not grow beyond them. In vain are they told that *it is not a question of preventing anything, or of permitting everything;* that what is asked of them, what

society is waiting for, is a means of reconciling the two * * * Competition is blamed for the disadvantages that are a consequence of its nature and not for the frauds it serves as occasion and pretext. * * * The collective unit of society is the shop. Now the shop necessarily implies an associated interest and private interests; a collective personality and individuals. * * * Afterwards come the relation of shops to shops, of capital to capital, in other words, competition and association. For *competition and association depend upon each other; one cannot exist without the other; far from excluding each other, they are not even divergent.* The very word competition pre-supposes an object common to many; * * * It is self evident that *competition, exercised for itself and with no other object than to maintain a vague and inharmonious independence, can come to nothing and that its fluctuations are never ending.* In competition, capital, machinery, processes, talent and experience, that is to say capital of another kind, are involved in the struggle; victory is certain to be on the side of the biggest army * * * *competition, if left to itself, can never reach a settled form* * * * Competition as an economic position or phase, considered as to its origin, is the necessary result of the intervention of machinery, of the formation of the shop, and of the theory of the reduction of general expenses. *Considered in its proper meaning and in its tendency, it is the form according to which collective activity is manifested and exercised,* the expression of social spontaneity, the emblem of democracy and equality, the most powerful instrument of the constitution of value and the support of association. As the expression of individual forces, it is the token of their liberty, the first moment of accord between them and the embodiment of the responsibility which unites them all and cements their solidarity. But *competition, left to itself and deprived of the control of a higher and determining principle, is only a vague movement,* an objectless fluctuation of industrial power, forever tossed to and fro between two equal extremes." (From chapter 5 of Proudhon's "Contradictions Economiques." The translation is ours.)

So much for the inherent nature of "competition," a word which is used colloquially by both lawyers and judges as well as by the man on the street, without a really judicial consideration of its relation to its own effects, and without thought of the fact that it is impossible to use it juridically as an absolute and arbitrary concept exclusive of all other concepts, even of those which are implicit within itself. This can best be brought out by a reference to the work of a French writer of commanding authority, Monsieur Adolphe Landry in his "Manuel D'Economique," who at page 276 *et seq.* says:

"Competition, therefore, is never perfect. *We may say not only that the idea of perfect competition is an unreal concept, but that it is impossible to understand how perfect competition could exist and impossible to imagine what its results might be.* How would consumers, taken individually, deal with one person instead of another? If such were the case and if they had no reason for dealing with one rather than another then what would become of competition among producers or sellers? It is said that the latter would reduce their prices until they no longer covered the cost of production, and would even fall below that cost, but such prices once reached, prices below which producers could not continue to exist, then how would the consumers act relatively to the producers? *As a matter of fact competition tends perpetually toward its contrary or rather we may say it is penetrated or dominated by its contrary.* Each producer ordinarily has some advantage over his rivals with respect to some articles relatively to certain territory, to a certain zone or to a certain class of customers, this class of customers being determined by community of tastes and if we find that a competitor who has better advantages, nevertheless does not have the preference, the reasons are not far to seek, such for instance as ignorance on the part of the consumer of their true interests,— and ignorance which is all the more natural where the conditions of competition among producers are subject to constant variations. * * *

"There is competition when two or more producers simultaneously offer the same commodities to the same buyers. The conditions under which competition exists are always variable; hence the necessity for distinctions. First, the most important distinction is that of competition in which the production of each competitor is necessarily limited, and those competitions between competitors whose production is unlimited. * * * As is at once seen, the competition is more intense — so to speak — when the production of each competitor may be increased; and is all the more intense in proportion as this production can be more easily increased. * * * Second, a point not without interest is that of the number of producers who are in competition. * * * The interest of this point, among other things, is that the number of competitors explains the beliefs which competition gives rise to among those who take part in it."

"Let us now consider competition as a general Term. *The economists have more than once constructed theories upon the idea of a competition where all competitors enjoyed conditions of perfect equality. The essential thing is to see whether this conception involves any reality; whether there does not always exist some sort of inequality between competitors.*" (The translation is ours.)

The great question now raised is whether it was the purpose of Congress to ignore and disregard the facts of economic law and to push the country for the time being into economic anarchy, or whether its purpose was merely to extend the Federal jurisdiction to national fields, in such manner as to enable the government to deal in matters of interstate commerce with well-known categories of crime, and to apply historical and universally recognized principles of public policy.

This question can only be answered by construction, and it is for the courts to determine whether the construction of the government, which is that of a reactionary revolution and an autocratic government, is to prevail, or whether the Act shall be given that con-

struction which shall make it not only just but efficient and beneficent.

The issue is both economically and juridically of the first magnitude, for if it be determined in one way the result will be industrial disorder, and a culmination in the amendment or repeal of the act, while if it be determined the other way the act will form an integral and workable part of our systems of equity and criminal law.

The Act may be read as having a reasonable meaning and an attainable purpose; it may be read also as a fanatical attempt to erect a superstition into a law in disregard of history and of the development both of the law and of national productiveness and prosperity, and to bring about a conflict between natural and civil law.

By a natural law I understand "the uniform occurrence of natural phenomena in the same way or under the same conditions" and its definition as "a formal statement of such uniformities in any given class of cases." (See Standard Dictionary.)

By a civil law I understand a rule of civil conduct enforced by the action of the judicial and executive departments of a government.

Natural laws may be physical, sociological, physiological, psychological in the largest sense, economic, intellectual or ethical.

We present these definitions to bring clearly before the mind the possibility of a conflict between a natural and a civil law. The possibility of conflict between a civil law and a natural law may therefore always arise in the relations of men in society and such conflict has been of constant occurrence in political and economic history, *e. g.*, laws recognizing the existence of slavery and so in conflict with the natural laws of individual freedom — laws prohibiting importation or exporta-

tion and so in conflict with the natural laws of exchange.

But the end of the State is the maintenance of order and the administration of justice and it follows that the juridical order must concern itself with the economic order.

The principles for which we are contending were fully recognized in the case of *Vegelhan* v. *Gunther*, 167 Mass. 92, where Mr. Justice Holmes wrote the opinion from which I make the following quotations:

"To illustrate what I have said in the last paragraph, it has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin some one already there, and succeeds in his intent. In such a case he is not held to act 'unlawfully and without justifiable cause', as was alleged in Walker v. Cronin and Rice v. Albee. The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. Commonwealth v. Hunt, 4 Met. 111, 134. Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them." * * *

"So far, I suppose, we are agreed. But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle. Commonwealth v. Hunt, 4 Met. 111; Randall v. Hazelton, 12 Allen, 412, 414. * * *

It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going so fast,

means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

"One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. * * *

"If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view of getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is wrong, if it is dissociated from any threat of violence, and is made for the sole object of prevailing if possible in a contest with their employer about the rate of wages. The fact, that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist, does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose, and with the effect, of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842 by the good sense of Chief Justice Shaw, in *Commonwealth v. Hunt,* 4 Met. 111." (The italics are ours.)

The proposition that no man has a right to be protected against the consequences of competition in such

manner as to guarantee his own continuation in business was fully determined in another Massachusetts case, in which it was held that his only right to protection was against the wanton or malicious acts of others. We refer to the case of *Martell* v. *White*, 185 Mass. 255, 257, 258, from which we quote as follows:

"The case presents one phase of a general subject which gravely concerns the interests of the business world and indeed those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere but some things at least appear to have been settled, and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that while a person must submit to competition he has the right to be protected from malicious interference with his business. The rule is well stated in *Walker v. Cronin*, 107 Mass. 555, 564, in the following language: 'Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. *If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing.*' (The italics are ours.)

Besides the general law of economic evolution there are other economic laws, and it is to the latter category that the law of the tendency of unrestrained and unregulated competition to destroy itself belongs. Closely bound up with this is the law of division of labor, as an aspect of the broader law of conserva-

tion or economy of energy, which results in the constantly increasing perfection of the technique of production and distribution, one of which perfections is the substitution of large scale industry for small scale industry and of large capitals and business organizations for small capitals and organizations.

But suppose the Supreme Court were to say "the Legislature may ordain that small scale production and manufacture and not large scale shall be the law of industry" would its ordinance be any more valid or intelligent than its claim that the rule of competition and not of combination shall be the rule of trade?

There is still another economic law, *i. e.*, the formal statement of a natural uniformity which, under like conditions and undisturbed, repeats itself, known as the law of constant return, viz., that the increase of the scale on which an industry is carried on is accompanied by a change in the proportionate cost of its product — may the Legislature by its ordinance say that an industry which obeys this law is prohibited?

So we have the laws of costs, of demand, of diminishing returns, of diminishing utility, of increasing returns, of indifference, of subordination of wants, of producers' substitution, consumers' choice, Gresham's Law of Money, etc. May the Legislature by ordinance repeal these laws and say what shall be the laws of economy?

All economic law expresses tendency precisely as the law of gravitation does. Shall the Legislature disregard this tendency, or law, or uniformity of trade and say that it shall not be the law of trade but that the precise thing which is rejected by this tendency shall be the law of trade?

The particular absurdity of the proposition is apparent when we think that according to it forty-~~six~~ eight Legislatures can each ordain the law of trade for its own

State, although there is only one economic state even if there be forty-~~six~~ political ones.

There is no such thing as *free* competition. All that is meant by the term or can be meant by it is that the factors are so numerous and their functions so incalculable that we call them free for want of any other term, although if the factors were few we could calculate their competitions, *i. e.*, their mutual interferences.

So Spencer says:

"A body in space subject to the attraction of a single other body, will move in a direction that can be accurately predicted. If subject to the attraction of two bodies, its course will be but approximately calculable. If subject to the attraction of three bodies, its course can be calculated with still less precision. And if it is surrounded by bodies of all sizes, in all directions, at all distances, its motions will be apparently independent of the influence of any of them; it will move in some indefinable varying line that appears to be self determined; *it will seem* to be *free.*"

This is the case with prices as indicating the line of a competition which is assumed to be *free* precisely and only because it is determined by countless elements which are themselves not determinable.

The failure to recognize the necessity for accuracy in classification lies largely at the root of the present "predicament" as that term is used logically. The courts have gone so far as not only to assume that every prevention of competition is restraint of trade, but as to assume also that every restraint of trade is prevention of competition, whereas, as a matter of experience, neither proposition is true.

The consequences are as follows: The court is driven to the alternative

(a) that all prevention of competition is restraint of trade and monopolizing (which is the conclusion of the opinions in the Tobacco case in the Circuit Court

and which results in the practical prohibition under the statute of all modern business methods) or

(b) that some other definitions must be found for restraint of trade and monopolizing. This would involve rejection of the propositions with regard to tendency, not only, but also a clear recognition that there are preventions of competition such as we have pointed out which are not restraints of trade or monopolizing.

If this latter alternative be admitted the court, in defining restraint of trade and monopolizing, must determine

(a) whether the definition be the historical one; or

(b) whether a new meaning is to be found, in which event the new meaning of the terms " restraint of trade " and " monopolizing " must be made perfectly clear so that it may be known of all men; or if alternative (b) be declined

(c) that a law may be valid without its being capable of being known by any man, and thus not only introducing an entirely new principle into the *corpus juris,* but, as matter of practice, leaving the government at its own will at all times to determine when, or when not, a business shall be put an end to, which is the introduction of a new principle of government.

XXI.

IT IS NOT THE LAW THAT—"IT IS ONLY ESSENTIAL TO SHOW THAT BY NECESSARY OPERATION IT (A CONTRACT OR COMBINATION) TENDS TO RESTRAIN COMMERCE OR TENDS TO CREATE A MONOPOLY."

To assert such a doctrine is to assert that Congress intended to convert the role of the courts from that of the application of determinate law to known facts, into that of the application of indeterminant law, by recourse to the function of prophecy, to unknown facts.

No system of jurisprudence ever has recognized or attempted to apply such a principle — and in fact there is absolutely nothing in the history of the development and evolution of law to indicate at any time any such recognition or any such attempt.

That the doctrine constitutes one of the main contentions of the government as a means for securing to itself a range of governmental power unknown in any modern constitutional state is undoubted, and the United States Circuit Court in the case of the *American Tobacco Co.* has said in terms:

"It is only essential to show that by its necessary operation it (the combination) *tends* to restrain interstate or international trade or commerce, or *tends* to create a monopoly," etc.

As against this novel doctrine which involves the right and power of government, as its agents may from

time to time prophesy, to interfere with and to attempt the regulation of the whole field of national commerce, we have the old time doctrine to which thus far we have adhered, viz., that the right of combination is as fundamental as the right of competition, and that *legality* and not *tendency* is the test of right, *i. e.*, that if the combination be free of fraud, duress, coercion, or generally of any of the elements of conspiracy, and be not designed, through recourse to any of these categories of wrong, to impair freedom of choice to enter a business, or capacity to remain in a business, or the extent of business done by any particular individuals — that then the combination is a lawful one and not subject to either restraint or punishment because of any supposed *tendency* which may characterize it.

The first illustration which we have been able to discover of the use of the word " tendency " in any such connection is in the opinion of Mr. Justice Story in the *Charles River Bridge case,* in which he refers to the " tendency of monopoly." The use of the phrase here was *passim* and wholly colloquial, but since then in the opinions of certain judges it has taken on a particular meaning standing for a vague legal concept. One of the early illustrations of this use of the phrase is to be found in the opinion of the late Judge Barrett of the Supreme Court of New York in the General Term in the case of the *No. River Sugar Refining Co.* (54 Hun, 354) which has played a very distinguished role as a point of departure in the development, not only in the courts of the different States but in the Federal courts, of this new theory. There Judge Barrett used the following words:

" Of course a monopoly in the strict, technical and absolute sense cannot be thus created, but a monopoly in a legal sense can. The monopoly with which the

law deals is not limited to the strict equivalent of royal grants or peoples' patents. *Any combination, the tendency of which is to prevent competition* in its broad and general sense and to control, and thus at will enhance prices to the detriment of the public, is a legal monopoly." (Italics ours.)

Judge Barrett and those who have followed him seem to have overlooked or disregarded the fact that such a doctrine involves not only a theory of history but a theory of economics, and radically changes the character of law from that of the application to specific acts of a rule of uniformity, to the application by the courts of their prophetic vision, as the same is determined by their knowledge and view of history and economic theory, without reference to the competency of the courts either as historians or economists.

The quick consequence of this doctrine was its application in the case of *People* v. *Chicago Gas Trust*, 130 Ill. 268, where the court, speaking of the control by the Gas Trust Co. of four other companies, said:

"*The question is not whether it has attempted to exercise such control; the law looks to the general tendency of the power* conferred." * * * "Whatever 'tends to prevent competition' between those engaged in the public employment, or business impressed with a public character, is opposed to public policy, and, therefore, unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy. * * * That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of a monopoly, results from the very nature of the power itself." (Italics ours.)

The same principle is further developed and begins to assume more definite shape in the case of *Dunbar* v. *American Telephone & Telegrayh Co.*, 79 N. E. 423, where the court said:

"While a complete monopoly or a complete restraint of competition (note: we here call the attention of the Court to the manner in which the concept 'restraint of competition' begins to assume shape as the synonym for monopoly) would not necessarily result, the *tendency would be in that direction, which is sufficient to condemn* the transaction as unlawful." (Italics ours.)

This question of tendency has already appeared in the jurisprudence of the Supreme Court in the *Knight case*, to which, in this connection, we shall refer hereafter, but its most noteworthy appearance prior to the decision in the *Northern Securities case* was in that of the *Freight cases* — where, however, it should be carefully noted that it was discussed, not as a generality, but as applying to a specific and very definite contract, and where the word might properly be taken as a precise synonym of obvious and necessary result.

In the *Joint Traffic Association case*, at page 561, Mr. Justice Peckham makes the following quotation from the opinion of the court in the *Trans. Mo. case:*

"The suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it."

And then commenting on this, among other things, he says:

"The extract from the opinion of the court above given shows that the issue so made was not ignored, nor was it assumed as a concession that the agreement did restrain trade to a reasonable extent. The statement in the opinion is quite plain, and it inevitably leads to the conclusion that the question of fact as to the necessary tendency of the agreement was distinctly presented to the mind of the court, and was con-

sciously, purposely and necessarily decided. It cannot, therefore, be correctly stated that the opinion only dealt with the question of the construction of the act, and that it was assumed that the agreement did to some reasonable extent restrain trade. In discussing the question as to the proper construction of the act, the court did not touch upon the other aspect of the case in regard to the nature of the agreement itself, but when the question of construction was finished, the opinion shows that the question as to the nature of the agreement was then entered upon and discussed as a fact necessary to be decided in the case, and that it in fact was decided. An unlawful intent in entering into the agreement was held immaterial, *but only for the reason that the agreement did in fact and by its terms restrain trade.*" (Italics ours.)

It is perfectly clear, therefore, that that case did not turn upon the doctrine of tendency "for the reason that the agreement did in fact and by its terms restrain trade."

How far such a view is from the real view of the Supreme Court is best illustrated by the following quotation from the opinion of the court, written by Mr. Justice Holmes in the *Swift case,* speaking precisely of the combinations referred to in section 1 of the act of 1890:

"Intent is almost essential to such a combination and is essential to such an attempt. Where such acts are not sufficient in themselves to produce a result which the law seeks to prevent, for instance, the monopoly, but require further acts in addition to the mere forces of nature to bring that result to pass, *an intent to bring it to pass is necessary in order to produce a dangerous probability that will happen.* (*Commonwealth* v. *Peaslee,* 177 Mass. 267, 272), *but when that intent and the consequent dangerous probability exists,* this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." (Italics ours.)

But apart from precise facts, such as those which existed in the case of the *Freight cases, the Swift case* and other cases decided by this court in the application of the Act of 1890, the resort to tendency as a test of legality is the application of a mere judicial guess. If there be any one thing which we may say with certainty of the court it is that they have as yet by no means conquered a complete knowledge of the economic conditions of the future. *We have as yet no working definition of tendency, no means for proving tendency, nor even any means for proving our rules of proof.* The only thing of which we are certain is that it is difficult, if not impossible, as has been pointed out by Nicholson in his Principles of Political Economy, vol. 3, p. 6, " to trace any continuity in general progress or even to discover the conditions favorable to the progress of humanity as a whole." " Perhaps the most remarkable result of a wide survey is the discovery that in the past the idea of progress has generally fallen short of the actual reality, and the comprehension of the meaning has generally lagged behind the making of history." (Id. 1.)

And yet there be those who assert that every man, even before he can possibly have the means of discovering whether his action has, or has not, a certain economic tendency, must be satisfied to await the determinations of the court as to whether or not his acts are or are not criminal. Tendency is the equation of all the economic factors in a community, and while no man can possibly work that equation out for himself, the government contends that if he fails to work it out correctly he commits a crime and that meantime, even before it be worked out, the court will solve the riddle for him by the simple process of convicting him of criminality. The whole process is a vast and complicated psychological one in which there are as many variables as the sum of the population, and as

many permutations as those possible to all the combinations of the variables themselves. *Nothing is ever certain but an actual result, and the law has nowhere or anywhere sought to determine or to punish anything other than actual result.* All potential results are unforeseeable, else history, economics and statescraft would be exact sciences. Everything depends upon the reaction of fact upon feeling and, to quote Jevons, who is as careful as any other student of social facts and of economy, says in his Theory of Political Economy (pp. 15 and 16):

"There is never, in any single instance, an attempt made to compare the amount of feeling in one mind with that in another. I see no means by which such comparison can be accomplished. The susceptibility of one mind may, for what we know, be a thousand times greater than that of another. But, provided that the susceptibility was different in a like ratio in all directions, we should never be able to discover the difference. Every mind is thus inscrutable to every other mind, and no common denominator of feelings seems to be possible. * * * Every event in the outward world is represented in the mind by a corresponding motive, and it is by the balance of these that the will is swayed. But the motive in one mind is weighed only against other motives, in the same mind, never against the motive in other minds. Each person is to other persons a portion of the outward world, the non-ego as the metaphysicians call it. Thus motives in the mind of A may give rise to phenomena which may be represented by motives in the mind of B; but between A and B there is a gulf."

Nevertheless, if the Government and the court below be right I am criminal, not because of what takes place in my own mind and as the result of my own motives, but according to what may take place in other minds from which I am separated by a gulf, and of which I can get neither the measure nor the tendency.

In other words, the mere possibilities of the social drift, quite apart from any action of my own will, is to determine whether or not I am a criminal. I am declared a criminal by a generic legal classification quite independent of myself or of my neighbor, provided my act helps to determine the public will or may even have in it the potentiality of determining the public will.

The application of the theory of tendency as an impossibility for specific decisions of the courts is particularly apparent when we come to deal with the question of price, which depends not only upon the equation of incalculable desires, and the application of the law of substitution of choice, but upon the great variable of the value of money itself as incident to its quantity and its relation to credit. The owner of an absolute and perfect monopoly may fix his price, but he cannot fix his market, and in spite of all so-called tendency the measure of his desire for a market will determine the measure of his desire for a price. This is true of monopoly markets as it is of competitive markets, as will be shown when we come to deal with that theory of the law which treats it as price legislation instead of criminal legislation.

The difficulty of any practical treatment of price as the calculus of an equation of individual satisfactions, instead of taking actual price as a fundamental factor in economic considerations, is well illustrated by the case assumed by Pareto (Economia Politica, Milano, 1909). He takes the relatively simple case of a market consisting of 100 individuals and 700 kinds or grades of goods or merchandise which, as he points out in the calculation of the equation, involves consideration of 70,699 conditions and consequently the solution of 70,699 equations. This, as he says, is practically beyond power of algebraic analysis and would be much more beyond that power if we take into consideration the

practically innumerable equations which arise in the case of a national population of forty, or let us say for the United States, of ninety millions of people, or let us say for Western Europe and the United States, four hundred millions of people and many hundred thousands of different kinds and grades of merchandise, located in hundreds of thousands of different places. Even if we could accurately know all of these equations, the only practical accessible means open to mankind for their solution is the observation of the practical solution which is supplied by the market isself, *i. e.*, by the study of the movement of prices historically, as they have been, and not as it is assumed they might have been under conditions which have not existed.

The doctrine of tendency is not even that of intelligent theory, and neither the development of law nor the economic development of society can be interpreted or retarded by the spider web of any theory whatever. "History, with its gigantic power similar to that of nature, does not allow itself to be taken captive in the spider web of theory. So soon as it puts itself in motion it breaks every web with a single stroke and leaves it to theory to put them together again for a new phase of the world." (Ihering, Geist des römischen Recht, book 1, title 1, chap. 1.)

In the very simplest things our attempted foresight fails, and warns us that judicial predetermination of tendency, is an impossibility. I can give no better illustration than the failure of the wiseacres when they attempted to predetermine the tendency of the effects of stage coaches and of railways. Giddings, quoting from Roberts, says: "In the last half of the 17th Century the Taunton stage took four days to reach London. Many finding this convenience prepared for them ceased to keep horses, which set going the croakers, who prophesied great evils from

the setting up of stage coaches. They said no good hackneys would be bred and that the agricultural interests would suffer." (Descriptive and Historical Sociology, p. 144.) If, during the '30s of the last century, any one should have been able, through the mediation of the courts, to apply the doctrine of tendency, as tendency was then foreseen, to the consequences of our railway development, we should still be in the day of stage coaches and canals, because railways were disastrous restraints of trade. There can be no more interesting illustration, as will be seen from reference to the note from the fifty-sixth chapter of McMaster's History of the People of the United States.[1]

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[1] "Concerning the relative merits of canals and railroads as means of transportation the friends of internal improvement were sharply divided. Canals, said one faction, are facts; railroads are theories, and are opposed to the habits and feelings of our people, for they create monopolies in transportation. A farmer cannot own railroad wagons. But for a hundred dollars he can buy a boat, or with the help of his hands can build one to carry twenty-five tons. To move such a load by railroad would require eight carriages and a locomotive, costing $4,000. Into his boat the farmer can put an assorted cargo of flour, bacon, hemp, plank, lumber, and vegetables, draw it to market with his own horses, sell at any village on the way, and bring it back loaded with what he pleases. Does anybody suppose railroads will take on loads offered anywhere along the line? No, indeed! the farmer must haul them to the stopping places. Canals will carry live stock, hay, firewood, large timber for ship-building, boards, and planks. Railroads cannot do this. What would be thought of a load of hay coming along a railroad? The sparks from the locomotive would set it afire before the journey began. Canals are adapted for military purposes; railroads are not. Imagine a regiment of troops with baggage, provisions, ammunition, and camp equipage transported by railroad! By canal this can be done, and the soldiers live and cook comfortably on the way. The boat will carry tents, food, baggage, and ammunition, and may be drawn by the horses, or by the men as they walk along the towpath. Canal boats will carry artillery, which cannot be transported by rail unless the guns are dismounted and the caissons taken apart. Snow will make a 300-mile railroad impassable for weeks; rain will wash earth over the rails in quantities which, in deep cuts, will take weeks to remove. Railroads for long distances are wholly untried in any country, and for short distances are yet in experimental stage.

It is difficult to see how mere tendency to monopoly violates the statute, if indirect restraint of trade be held to escape it. The court put its finger very clearly and definitely upon this point, in *the Knight case* (p. 16), when it said:

"Contracts, combinations, or conspiracies, to control domestic enterprise in manufacture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably *tend* to restrain external as well as domestic trade, but the restraint would be an *indirect* result, however *inevitable* and whatever its extent; and such result would not necessarily determine the object of the contract, combination or conspiracy."

Unless the law tends as the world tends the law is worse than a dead letter, it is a mischievous letter.

The longest in existence, Manchester and Liverpool, is but forty miles in length, passes through the heart of a populous country, and may anywhere get aid to repair cars, wagons and engine. But that such a road as the Baltimore and Ohio, ten times as long, running through a rough, wild, and sparsely inhabited country, with great difficulties of construction to overcome, should ever compete with a canal of the same length as the Chesapeake and Ohio surpasses probability.

"If locomotives were used it would be necessary to have water-boiling stations every six or seven miles to furnish the engines with tanks of boiling water, for a supply of cold water would check the generation of steam and stop the train?

"Rails would be broken by passing teamsters wantonly, as they did mile-stones and copings of bridges, or from spite toward a means of transportation likely to injure their business. In the mountains the cold in winter is often so severe that an axe will break when struck against a tree. Would not rails snap under these conditions as a train passed over them? Admit that the railroad can be made a success; would it not monopolize transportation, and would farmers and teamsters submit to this?

"For novelty and speed a railroad might be preferrable to stage coaches and canal boats, but for a long journey or when travelling with a family, a canal was better. Passengers on a canal boat, as it moved along, could eat their meals, walk about, write letters. In a car these things were impossible. In a canal boat they were as safe as at home. In a car who could tell what might happen, especially at night, from the acts of evilly disposed persons. Said another: There may be, there must be, much exaggeration in the stories published daily about the superiority of railroads over all other means of travel."

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If there be a world-wide change of conditions, fields, units of competition, and this in turn limit competition as it existed under the older and outworn conditions, then the law which seeks to punish the limitation of the form of competition away from which the world is moving, and to prevent the drift to the forms of competition toward which the world is moving, is merely struggling to set back the hand of time, to turn evolution into dissolution, regeneration into degeneration, to make life itself stagnant, to put an end to that great, unconscious process, the economic uniformity by which society adopts those new and always newer processes, even though they result in the economic loss of the outworn and outlived. A statute which is so intended is not only an enactment of madness, but involves a destruction of every constitutional right. Fortunately the Act of 1890 produces no such result, provided only that in construing it we abide by the common rule of right; the doctrine of intent, implicit or explicit, on the one hand, and the fact of actuality, instead of speculative potentiality, on the other.

BLEED THRU

XXII.

IT IS NOT TRUE THAT THE STATUTE MADE THE POWER TO COMMIT A CRIME EQUIVALENT TO THE COMMISSION OF A CRIME, NOR THAT IT INTENDED TO PUNISH THE MERE EXISTENCE OF SUCH POWER AS A CRIME.

In equity as well as in criminal law the theory is a complete novelty and involves, moreover, the disregard of every principle of construction as applied to a criminal statute. It is, however, seriously advanced by the government with the result that if the theory be adopted by the court, it is only necessary for the government to establish the assumed power of a combination or association of men in order to establish their illegality. *We may go even further and say that it is necessary for the government only to establish that if it be a matter of current belief, no matter how erroneous, that such power exists, then the defendants are committing a crime, not even because they have the power but because they are believed to have the power to commit it.* If it be believed that a combination has the power to advance prices, even though it be demonstrated that the law which governs monopoly prices is identical with that which governs competition prices, nevertheless, the defendants would be guilty, precisely upon the same theory that under the old

English law persons were guilty who were believed to possess the power of witchcraft and sorcery, even though sorcery and witchcraft were pure superstitions.

This, however, does not seem to have influenced the court below, which adopted the government's theory and repeated it in summary form in the following terms:

"The extent to which they (defendants) have exercised their power is immaterial. *The question* presented by the present inquiry is *one of the existence of power not its exercise.*" (Noyes, J., 164 Fed. 720.)

It is true that in the *Northern Securities case* the Circuit Court said:

"It is our duty to ascertain whether the proof discloses a combination in direct restraint of interstate commerce — that is to say, a combination whereby the power has been acquired to suppress competition."

But this statement does not seem to have been carefully considered, because it is obvious that proof of "a combination in direct restraint of interstate commerce" is by no means equivalent to or identical with "a combination whereby the power has been acquired to suppress competition." The court, by the use of the phrase, "that is to say," stated these as identical and convertible propositions, which they are not, and which this court never has held them to be. *All that was actually held in the Northern Securities case was that the particular transaction was vitiated because its intent was to evade the statute and to produce precisely that actual restraint of trade which the statute had in view.*

The theory, nevertheless, has been developed that the statute meant to erect potentiality for crime into actual criminality. But the concept of crime involves some finality either in the form of an act or in the form of a determination to commit the act — never the power merely to reach such determination; otherwise

the mere power of action, the simple power of determination, makes criminals of us all because we are all potential criminals. It seems needless to take up the time of the court in discussing so revolutionary a doctrine. It is true that the Legislature may decree that some specific act is criminal because it places the instrument of criminality in the hands of the actor. This is instanced by the law prohibiting the *carrying* of dangerous weapons, or the *operation* of an automobile without a license, but in each of these cases the statute takes care to specify an act which is punishable wholly without reference to any other question — otherwise the mere possession of an automobile which might be criminally used, or of an antique sword, or an army rifle used by an ancestor, would make the possessor criminal because he had the power to will a crime and the instrument to execute it.

It is inconceivable that Congress should have had any such intention without having explicitly declared it, and in that event subjecting its legislation to the test of constitutionality. It is inconceivable that it should have intended to limit the power of a State to permit the ownership by one corporation in shares of another. Where there is such a legislative purpose it is susceptible of clear declaration. Thus, for example, the New York Public Service Law prohibits the acquisition or holding by certain corporations of more than 10 per cent. of the capital stock of certain other corporations. It might have made the prohibition absolute, but no such prohibition would be read into a statute by implication — it must be explicit. To say that because such ownership carries with it certain power (and it is quite immaterial whether the power be the moral consequence of a minority holding or the legal consequence of a majority holding) the statute implies that its acquisition is prohibited, is to disregard not only every principle of justice and every rule of legislation but every canon of construction.

XXIII.

THE ANTI-TRUST LAW OF 1890 IS NOT A PRICE-REGULATING STATUTE AND HAS NO REFERENCE TO PRICES.

All attempts at the regulation of price by legislation have been abandoned as contrary to the modern spirit, and it is doubtful whether any legislative regulation of price, except so far as concerns prices to be paid by the government itself, would be constitutional. It is true that certain of the States still have usury laws which make it impossible to collect interest in excess of a given rate. While it is possible that as a survival of immemorial custom the several States have the right under the exercise of their police power not only to determine the legal price for the loan of money but to declare usury a crime, it is certain that so far as our national jurisprudence has developed there is nothing to justify us in the belief that a national usury law would be constitutional, or that any other national law regulating price would be constitutional, unless it be the prices to be charged by public service corporations engaged in interstate commerce — and the constitutionality of this is most doubtful.

Judge Noyes, in the Circuit Court below, adopts as the law of this case the dictum of Mr. Justice McKenna, speaking for the court, in the case of the *National Cotton Oil Co.* v. *Texas,* and in that case the court said:

"*And the purpose is so definitely the control of prices* that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combination and their profit, and it is such power that makes it the concern of the law to prohibit or limit them."

Now, the only statutes under consideration in the case of the *National Cotton Oil Company* were those of Texas, and any reference to the Federal Anti-Trust Law was purely *obiter*.

And yet nothing could be more notable with regard to the Federal statute than the fact that it makes no reference to price, but only to restraint of trade and monopolizing, whereas the Texas Act which was in existence when the Federal Act was passed, and the phraseology of which was carefully avoided by the Federal statute contains a definition of a trust as a combination, etc., " to limit or reduce the production, or increase or reduce the price of merchandise or commodity." This was the phrase as used in the Texas statute of March 8, 1889. In the amendment of 1895, and in a redistribution of the terms of the definition, the same phrase was retained, viz., " to increase or reduce the price of merchandise, produce or commodities." This act, moreover, referred specifically in subdivision 5 of section 1 to agreements " in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity," etc. This same language is repeated in subdivision 5 of section 6 and it, therefore, becomes apparent at once that price was a controlling term, whereas in the Federal statute the controlling terms were restraint of trade and monopolizing without reference to price.

When the Texas Act was further revised in 1903 it was essentially the same as its predecessors, and one

of the matters complained of in the charge of the court in the case of *Waters Pierce Oil Co.* v. *Texas,* 212 U. S. 98, was the reference to the provision of the act defining a trust among other things as " a combination of capital, skill or acts by two or more persons, firms, corporations, or associated persons, or either two or more of them for any or all of the following purposes * * * 2. To fix, maintain or increase the price of merchandise in Texas."

The Kansas Act was passed in 1897, and the question of its constitutionality was involved in the case of *Smilie* v. *Kansas,* 196 U. S. 447. This act defines a trust as a combination of capital, etc. * * * " 2d. To increase or reduce the price of merchandise, produce or commodities, or to control the cost of rates of insurance. * * * 4th. To fix any standard or figure whereby its price to the public shall be in any manner controlled or established, etc. 5th. To make or enter into * * * any contract * * * by which they shall in any manner establish or settle the price of any article or commodity * * * " etc.

In the court below Judge Noyes adopts the decision of this court in the case of the *National Cotton Oil Co.* as construing not only the Texas statute, but the Federal Anti-Trust Law of 1890 as well.

We are not, however, here concerned with these two State acts, but only with the Federal statute, and we emphasize the fact that if the Congress had meant what the Legislature of Texas and Kansas had meant it would have said so, and the fact that it has not said so is conclusive evidence to the effect that it did not intend to say so. It was competent for both these States to pass legislation which might be futile, and might have been passed in complete ignorance of the fact that whatever be the purpose of a trust with regard to price, the natural law of price is superior to and dominates the purpose of the trust, *i. e.,* the Legislatures of both of these States may have been disregard-

ful or ignorant of the prevailing economic theory of both value and price advanced by the modern American, English, French, German, Austrian and Italian schools of economy. But we are justified in assuming that Congress, precisely by its avoidance of this method of legislation, intended also to avoid the errors and futilities consequent upon its adoption. When it used the words " by trust or otherwise " it meant trust as the same existed at the time of the passage of the statute, and what that was appears sufficiently from our enumeration of the different forms of combination which existed when the law was enacted. It did not enter upon definition and above all, it certainly could not be assumed without saying so to have adopted as a definition the words of a State statute, or to have read into its own enactment, as terms of a definition, the words of whatever State statutes might thereafter be enacted. The inadvertent reference in the opinion of this court to the Federal Act in the opinion which it rendered with regard to the meaning and constitutionality of the Texas Act has been improperly taken by the court below, and is now improperly adopted by the government, as the test of the meaning of the act under which this action was brought. If, however, such were held to be the meaning of the Act of 1890, this construction would raise anew all the questions of constitutionality which our construction avoids.

THE ACT OF 1890 IS CONSTITUTIONAL UNDER OUR CONSTRUCTION AND UNDER NO OTHER.

The constitutionality of the act depends on its construction. From an unconstitutional act of a Legislature, or the Congress, an appeal lies to the courts. From a construction or application of a statute by the Supreme Court of the United States which would violate what is generally and universally conceived as the right of property, or of personal liberty, or of association, or of freedom to contract, there is no appeal. While it is true that our system of government consists of three equal and co-ordinate branches or departments of government, it is equally true that in a particular case the courts are the highest and final expression of sovereignty because from them there is no appeal.

Though certain constructions would undoubtedly make the Act of 1890 an unconstitutional one, it is our duty as officers of the court to contend for that construction which shall give it effect instead of nullifying it. (See opinion of the court by Mr. Justice White in *U. S.* v. *D. & H. Co.*, 213 U. S. 407, 415.) It is not for us to answer the contention of the government by attacking its effect as rendering the statute unconstitutional — that is to say, to attack the results of an unjustified and unjustifiable hypothesis, but it is our duty to demonstrate that the hypothesis itself is erroneous quite independently of its consequences, and to find that meaning

which is consonant with the universal principles of justice, and is demanded not only by the rules of definition but by the canons of construction. Upon its own construction of the Act as applied to particular cases the constitutionality of the statute has been already upheld, and the learned Chief Justice has shown that other constructions and applications are impossible because they would require its consideration from the point of view of constitutionality, whereas, what is required is to determine its meaning on the theory of its constitutionality. Unless the words "Contract," "Combination," "Conspiracy," "Attempt," "Part," "Commerce," "Restraint of Trade" and "Monopolize" are given a definition which permits the use of the words "every" and "any," then the statute must be unconstitutional for the same class and kind of reasons which compelled this court to find the Employer's Liability Act unconstitutional.

The reasonable construction of the Act is that which will establish it as one of the most enlightened and one of the best drawn statutes of our time and which will make it in the hands of this court a potent instrument of justice, instead of an establishment of economic anarchy, a legislative and judicial effort to determine the law of progress instead of the law of right, and an engine for the revolution of all existing relations between the citizen and the government.

We claim:—

That it was not the purpose of Congress to punish where there is neither any proved wrong nor any proved intention to wrong;

nor to create a new theory of criminality, *i. e.*, a crime without intent, and that if such had been the purpose it would have been expressed;

nor to interfere with the acquisition and disposition of property;

nor to depart from general principles of law;

nor to intend anything unreasonable;

nor to destroy the right of individuals to make just and reasonable contracts;

nor to say how much, or what, property may be acquired by individuals or corporations, or how large a business may be done by individuals, or corporations, or to say when, by process of growth, the business of an individual or a corporation passes from the legitimate to the illegitimate and from the innocent to the criminal;

nor to make acquisition a crime, for acquisition may be the act of the law itself, through the statutes of distribution or as the result of the exercise of testamentary power;

nor to say that the mere possibility of a particular use is a prohibition of all use or ownership;

nor to declare that a corporation or partnership or aggregation of assets or of money, capital or capacity, is, as such, combination or conspiracy;

nor that to buy shares of stock in a corporation, or to sell one's property in order to avoid its destruction as the result of competition, is to enter into a combination or conspiracy;

nor to change the character, duties and responsibilities of legal personality;

nor to call for the dissolution of corporations where the same are not designed for the purpose of the evasion of the statute;

nor retroactively to affect the rights of property;

nor to reverse the rule of *stare decisis* where the same is necessary for the preservation of the obligations of contracts made in conformity with the decisions of the court;

nor to declare that corporations are criminal because of the mere fact of their incorporation;

nor to establish any new theory of the law of corporations;

nor to say that an individual may be guilty of an attempt to monopolize, although every individual monopolizes business to the extent to which he does it;

nor that Congress was ignorant of or disregarded its own constitutional power;

nor to authorize the courts to restrain acts of ownership or the exercise of rights of ownership;

nor that the act was intended as an attack upon or a limitation of the principle of property;

nor to say that Congress by legislative fiat meant to decree that the power to commit an act is equivalent to its commission;

nor to impose novel fetters on trade by the introduction of the mediæval theory of "Just Price";

nor to enact a regulative statute as distinguished from a criminal one;

nor to inaugurate a policy of unwisdom and to introduce economic disorder and anarchy into the Constitution of the nation;

nor to oust the States from control of all economic activities the product of which may become the subject of interstate commerce;

nor to substitute one economic order for another, to reverse the course of history and to be guilty of a legislative miscarriage by decreeing that "competition and not combination shall be the law of trade";

nor to legislate against an assumed "tendency" and compel the defendant to disapprove something which is itself incapable of judicial proof;

nor to repeal the right of association;

nor to make the government the master of economic liberty.

On the other hand the meaning of the Anti-Trust Act of July 2, 1890, *is clear.*

It is that hereafter the "rule of right" shall be enforced and the "right to law," i. e. to be protected by definite and equal laws, and not by the whims of men, shall be upheld uniformly throughout the whole nation in respect of commerce between the States. Its motive was justice — not destruction of the rights of property or association, but of the abuse of these rights. Its principle is justice,— the extension throughout the relations of men in national commerce of the exclusive right of the Nation to limit the right of the citizen and to prohibit its abuse. It was no new doctrine of right and wrong,— but provision for the completion and perfection of the machinery of justice. Its policy was jural, and neither economic nor political; to prevent and punish wrong doing, not to establish a new economic or political order.

January 2d, 1911.

WILLIAM M. IVINS.

APPENDIX.

Definitions.

"MONOPOLY" AND "MONOPOLIZE."

COKE'S DEFINITION (U. S. v. E. C. Knight Co., 156 U. S. 9, 10):

"In commenting upon the statute, 21 Jac. 1, c. 3, at the commencement of chapter 85 of the third Institute, entitled 'Against Monopolists, Propounders, and Projectors,' Lord Coke, in language often quoted, said:

"It appeareth by the preamble of this act (as a judgment in Parliament) that all grants of monopolies are against the ancient and fundamental laws of this Kingdome. And therefore it is necessary to define what a monopoly is.

"A monopoly is an institution, or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome or liberty that they had before, or hindred in their lawful trade.

"For the word monopoly, dicitur απο το μονο (i. *solo*) και πωλεομαι (i. *vendere*) *quod est* cum unus solus aliquod genus mercaturae universum ***vendit, ut solus vendat, pretium ad suum libitum statuens;*** hereof you may read more at large in that case. Trin. 44 Eliz. Lib. 11, f. 84, 85; *le case de monopolies.*' 3 Inst. 181."

WEBSTER'S DICTIONARY:

mo-nop'o-ly (-li), n.; pl. -lies (-liz). L. *monopolium*, Gr. μονοπωλια, μονοπολιον; μονος alone; — πωλειν, to sell.) 1. The exclusive right, privilege, or power of selling or purchasing a given commodity or service in a given market; exclusive control of the supply of any commodity or service in a given market; hence, often in popular use, any such control of a commodity, service, or traffic in a given market as enables the one having such control to raise the price of a commodity or service materially above the price fixed by free competition. At the common law the term *monopoly* was specifically applied to an exclusive privilege of trade created by state grant or charter, and the term is still sometimes so used. Exclusive control of traffic constitutes a monopoly in the economic sense, whether acquired by state grant (as in the case of patents or copyright, which are statutory exceptions to the common law rule making monopolies illegal), by control of sources of supply (as in case of mines), by engrossing (which see) an article (as in case of cornering the market), by combination or concert of action, or by any other means.

STANDARD DICTIONARY:

monopolize, 1. to secure or exercise a monopoly of; possess the exclusive privilege of producing, trading in, or transporting; as, to *monopolize* a business. 2. to obtain or assume exclusive possession or control of; engross; as, to *monopolize* one's time.

monopoly, 1. The exclusive right, power, or privilege of engaging in a particular traffic or business, or the resulting absolute possession or control; especially, in political economy, such control of a special thing, as a commodity, as enables the person or persons exercising it to raise the price of it above its real value, or above the price it would bring under competition.

CHAMBER'S ENCYCLOPEDIA:

Monopoly is properly definable as the sole or exclusive right of selling or trading enjoyed by an indi-

vidual or group of individuals. In its strict sense monopoly belongs to an economic era which has passed away. During mediæval times and the period that followed, exclusive rights prevailed in almost all departments.

* * * * * * * * *

The spread of freedom has tended to the abolition of such monopolies, whether vested in individuals, in trade corporations, or in great companies engaged in foreign commerce. But, while the monopoly of law has so far passed away, new tendencies towards a monopoly of fact have been setting in. Under the prevalent system it is still the aim of the competitor to secure as far as possible the exclusive sale of the commodity in which he deals, either in the world-market or over a given portion of it; and when the single competitor is not strong enough to accomplish this, he seeks to attain his object by combination with a group of those engaged in the same business.

* * * * * * * * *

We have here merely to point out that in all such combinations, whether operating over the whole world-market or over a portion of it, the tendency towards a monopoly of fact is involved.

PALGRAVE'S DICTIONARY OF POLITICAL ECONOMY:

Monopoly means literally sale by one man; but the term is extended to denote either sale, or purchase (e. g. of labor), by either one man or a group acting as one man (e. g. a trade union). The definition thus enlarged is usually, or should properly, be limited by the condition that the monopolist deals, not with another monopolist, but with parties who compete against each other. Thus Ricardo (Political Economy, ch. vii.): "Commodities are only at a monopoly price * * * when the competition is wholly on one side * * * amongst the buyers." And this limitation is reasonable; for value in "isolated exchange" (Böhm-Bawerk) is not determined by the same laws as in "one-sided competition" (id.). Such is the definition here adopted; to the exclusion

of a wider sense sanctioned by authority, according to which monopoly exists wherever the number of sellers is not reduced to one, but restricted to a class. It is in this sense that Adam Smith speaks of "the monopoly of the colonial trade," and Cairness and Professor Bastable, of a country having the monopoly of an article, although the traders in a privileged country are not supposed to be in combination. So Mill treats of the "natural monopoly in favor of skilled labourers" (Pol. Econ., bk. ii. ch. xiv. Section 2, Section 3, par. 1, ch. xv. Section 3, last par.); and, in another connection, considers the case of the "sharers in the monopoly" being "numerous" (bk. v. ch. x. Section 4). Senior, observing that competition is not free where the concurrence of "an appropriated natural agent" is required, describes the proprietor of such agent as a monopolist. According to him, all landlords are monopolists (Political Economy, p. 105); Schäffle designates as *Monopol Verhältnisse,* those advantages which he has treated of as "*ausschliessende Verhältnisse.*" But according to the view here taken, *Monopoly* does not include Rent and quasi rent.

Monopoly in the sense here adopted plays a greater part in modern economics than has been assigned to it in the classical treatises. Witness the spread of trade unionism, the growth of combination in the new form of trusts, the prevalence of joint stock companies, particular railway companies. Mr. Baker estimates that the yearly earnings of all "transportation lines" in the United States, are about one-tenth of the total value of all the year's products. The sphere of monopoly is also being enlarged by the growth of municipal and governmental industries.

The determination of value under monopoly is not so simple as might be supposed from some expressions of classical writers. Thus Adam Smith says: "The price of a monopoly is upon any occasion the highest which can be got" (Wealth of Nations, bk. i. ch. vii.); and Ricardo "when a commodity is at a monopoly price, it is at the very highest price at which the consumers are willing to purchase it" (Political Economy, ch. xxxi.). These propositions are true theo-

retically, upon the hypothesis that the monopolist makes a separate bargain with each buyer. But in practice he must often find a uniform price for all, or at least a whole class of purchasers. The simplest case is where one price is made for the whole market, and the article monopolised is supplied without cost, e. g. the water of a "mineral spring" (Cournot). The price is determined by the condition that price x the amount demanded at that price — the product of an ordinate and co-ordinate of the demand curves — should be a maximum. The case is less simple, the representation less elegant, when cost of production is incurred by the monopolist, and when he fixes different prices for the same articles sold to different classes (e. g. theatre tickets to soldiers and to citizens), or for different articles which have in part joint products; such as the carriage of different classes of goods on a railway, the permanent expenses of which are paid out of the rates indiscriminately. The only general principle is to charge on each article "what the traffic will bear." (pp. 805, 806.)

The causes of industrial monopolies are clearly to be found in the modern form of industrial organization, in which immense amounts of capital are required. Competition between such great establishments becomes so fierce that often ruin threatens all the rival establishments unless some form of agreement between them is reached. In many instances they have been aided by the railroads, which gave them preferential freight rates, sometimes the tariff laws have helped them.

The results of these monopolies are in part beneficial to society, in part dangerous. (1) A great saving to society is effected by working the best plants in the combination to their full capacity, and stopping the others entirely. (2) All the production in any one line is put under the management of the leading experts in the country. (3) A great organization with branches in different parts of the country, by supplying its customers from the nearest establishments, is able to save much in transportation, especially in the case of bulky articles. (4) A very large establish-

ment is able to save much in the way of side products that in a small establishment must be wasted. (5) A very large establishment can often afford to keep in its employ inventors and experts whose sole business it is to devise new and improved methods of production. (6) Through these savings it is possible for the monopolies, while still making a good profit, to lower prices to consumers. A careful study of their influence on prices within the last few years in the United States, however, shows that, while their prices might have been lowered, the monopolies preferred rather to increase their profits, so that the prices have been somewhat higher than formerly under the system of free competition. It has been impossible, however, for the prices to be kept much above the level of competitive prices, on account of the new rivals that were thus called into the field. (pp. 804–5.)

NEW ENGLISH DICTIONARY:

Monopolization: The action of the verb Monopolize; the process of monopolizing or the condition of being monopolized.

Monopolize (f. Monopole or Monopoly + ize. Cf. F. monopoliser).

1. trans. With reference to commerce: To get into one's hands the whole stock of (a particular commodity); to gain or hold exclusive possession of (a trade); to engross.

Now tending to be felt as merely a contextual application of sense 2; the use with a saleable commodity as obj. is consequently almost obsolete. In early use often, + to monopolize into (one's hands; also + const. from).

Monopoly (ad. late L. *monopolium*, a. Gr. (also) f. Mono- to sell. Cf. Monopole sb.)

1. Exclusive possession of the trade in some article of merchandise; the condition of having no competitor in the sale of some commodity, or in the exercise of some trade or business.

2. In generalized sense. (In 17th c. often, + the crime of 'engrossing.')

3. Trans. and fig. (often with conscious metaphor). Exclusive possession, control, or exercise of something.

4. *To make a monopoly of:* a. *lit.* to obtain the exclusive sale of (a commodity); b. fig. to "monopolize," keep to oneself (a possession).

5. A thing which is the subject of a monopoly (in senses 1–3).

6. A trading company that has a monopoly.

7. attrib., as monopoly license, price.

TEXT WRITERS AND OTHERS:

In explaining the meaning of section 2 SENATOR EDMUNDS said:

"I have only to say, in regard to the amendment suggested by my friend from Delaware and the suggestions of the senator from West Virginia, that this subject was not lightly considered in the committee, and that we studied it with whatever little ability we had, and the best answer I can make to both my friends is to read from Webster's dictionary the definition of the verb 'to monopolize;'

"1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea.

"Like the sugar trust. One man, if he had capital enough, could do it just as well as two.

"2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place or with any country or district; as to monopolize the India or Levant trade.

"The old definition. So I assure my friends that although we may be mistaken (we do not pretend to know all the law) we were not blind to the very suggestions which have been made, and we thought we had done the right thing in providing, in the very phrase we did, *that if one person instead of two by a combination — if one person alone,* as we have heard about the wheat market in Chicago, *for instance* — did it, it was just as offensive and injurious to the public interest as if two had combined to do it." (Cong. Record, vol. 21, part 4, pp. 3151–2.)

"A license or privilege, allowed by the King for the sole buying and selling, making, working or using of anything whatsoever whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before."

MARSHALL:

"In fact when the production of a commodity conforms to the law of increasing return in such a way as to give a very great advantage to large producers, it is apt to fall almost entirely into the hands of a few large firms; and then the normal marginal supply price cannot be isolated on the plan just referred to, because that plan assumes the existence of a great many competitors with business of all sizes, some of them being young and some old, some in the ascending and some in the descending phase. The production of such a commodity really partakes in a great measure of the nature of a monopoly; and its price is likely to be so much influenced by the incidents of the campaign between rival producers, each struggling to have a true normal level." (Principles of Economics, Alfred Marshall, vol. 1, p. 397.)

"It may therefore appear as though the amount produced under a monopoly is always less and its price to the consumer always higher than if there were no monopoly. But this is not the case.

"For when the production is all in the hands of one person or company, the total expenses involved are generally less than would have to be incurred if the same aggregate production were distributed among the multitude of comparatively small rival producers. They would have to struggle with one another for the attention of consumers, and would necessarily spend in the aggregate a great deal more on advertising in all its various forms than a single firm would; and they would be less able to avail themselves of the many various economies which result from production on a large scale. In particular they could afford to spend as much on improving methods of production and the machinery used in it, as a single large firm which knew that it was certain itself to reap the whole benefit of any advance it made.

" This argument does indeed assume the single firm to be managed with ability and enterprise, and to have an unlimited command of capital — an assumption which cannot always be fairly made. But where it can be made, we may generally conclude that the supply schedule for the commodity, if not monopolized, would show higher supply prices than those of our monopoly supply schedule; and therefore the equilibrium amount of the commodity produced under free competition would be less than that for which the demand price is equal to the monopoly supply price. * * *

" So far we have supposed the owner of a monopoly to fix the price of this commodity with exclusive reference to the immediate net revenue which he can derive from it. But in fact, even if he does not concern himself with the interests of the consumers, he is likely to reflect that the demand for a thing depends in a great measure on people's familiarity with it; and that if he can increase his sales by taking a price a little below that which would afford him the maximum net revenue, the increased use of his commodity will before long recoup him for his present loss." (Principles of Economics, Alfred Marshall, vol. 1, pp. 485, 486.)

PIERSON:

" Such prices are monopoly prices, and it is hardly necessary to say that they are largely under the control of those who produce the goods. But how far does this control extend, and is it likely that the monopolist will make use of the comparative liberty which he possesses in such a way as shall harmonize with the interests of society?

" How far his control extends can be readily stated; at a certain price, which, however, may be very high in the case of some articles, all demand ceases. But it is safe to assume that in very many cases the monopolist will ask considerable less than this high price. More especially will this be the case when the article belongs to that class of which the sale is very readily affected by a change in the price.

" He may ask what price he likes, but the amount of the article which he will be able to sell at that price is a thing beyond his control. He has to choose. If he

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wishes to sell a certain quantity he must not try to influence the price; if he wishes to influence the price, he must wait to see what quantity he will be able to sell. The monopolist can control the price, or he can control the sale, but he cannot control both at once.

"Herein lies a safeguard against excessive dearness in the case of certain goods supplied under conditions in which competition is either altogether wanting or, at any rate, not very keen? That which competition — had there been any — would have brought about in such cases, the sellers themselves bring about, simply by adopting the course which they well know to be the one best calculated to further their own interests. They could ask much higher prices if they chose, but doing so they would reduce their aggregate profits.

"There are not many legal monopolies, especially in Holland, since the granting of patents for inventions was abolished in that country. But there are natural monopolies, as for example, when, in a given spot, room to carry on a particular industry exists for one person only; or for none but a very small number of *entrepeneurs*, who can easily, and do in fact generally, come to a mutual understanding. The reason why, in such cases, the prices are not always excessively high is, that high prices are by no means incompatible with low profits, and the *entrepeneurs* are aware of this. (Principles of Economics, Pierson, vol. 1, pp. 344, 345, 346, 347.)

JEVONS:

"In theory the laborer has a monopoly of labor of each particular kind, as much as the landowner of land, and the capitalist of other requisite articles. Property is only another name for monopoly."

* * * * * * * * * * * * * * *

"But when different persons own property of exactly the same kind, they become subject to the important Law of Indifference, namely, that in the same open market, at any one moment, there cannot be two prices for the same kind of article. (Jevons, Principles, Preface, li.)

LANDRY:

"These considerations lead us naturally to the consideration of Monopoly.

BLEED THRU

" What is Monopoly? According to etymology a producer or a merchant has a monopoly when he is the only seller of a given commodity.

" This etymological meaning has been enlarged in different ways.

" First, there are authors who see Monopoly wherever there exists to the benefit of this or that individual what is known as advantages of production. In a certain sense this conception can be defended. Advantage of production does not itself constitute a Monopoly, but it may be said that it creates a Monopoly, that it at least tends to create one, that it therefore ought to create one since it consists in the possibility on the part of the person who can sell more cheaply than his rivals within a certain territory or can at the same price supply goods which will be more highly appreciated by customers than the products of his competitors." (Manuel d'Économique, p. 279.)

HOBSON:

" But apart from the check through the survival of free businesses (which is often weakened by the fact that the latter may, and often do, prefer to let the trust fix profitable prices, which they adopt, and upon which they thrive), there are two other checks on the power of a ' monopoly ' over prices. One is contained in the elasticity of demand, which in every case affords a natural limitation on the power of raising prices. A monopolist must be careful not to spoil his market by excessive prices, and to calculate carefully what price will give him the largest aggregate profits.

" The other check is afforded by the possibilities of substitution. In each of its main uses as illuminant, motor, lubricant, etc., oil competes with other articles, and the possibility of recourse to some alternative articles qualifies every monopoly. (Hobson's Industrial System, p. 198.)

" But as the law of substitution opens out, we get glimpses of a wider, more general, sympathy and opposition between trades. The productive energy of man, directly operative through labour, indirectly through capital, is within certain limits free to choose among all the various channels of industry; they are all open to him as alternative occupations. So there is

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a more universal sympathy and opposition between all trades than any yet named. All causes affecting the volume, fluidity, and efficiency of the capital and labour in a community will affect all trades in common. In proportion as labour and capital are free to enter several trades, and even to transfer themselves from one occupation to another, they must be regarded as forming a common fund of industrial energy which pulsates through the whole framework of industry, as the blood courses through the various organs and cells of the body, energising all alike. Though, as will appear on closer examination, the flow of labour and also of capital is far from free, and is, in fact, impeded by many economic barriers, there is enough fluidity to give a real unity to th terms 'labour market' and 'market of loanable capital.' Capital and labour can flow into various channels of production with sufficient freedom to make every trade sensitive to the expansion and contraction, the prosperity and depression, of every other trade." (Idem., p. 29–30.)

TARDE:

"The trust is very far from being able to fix prices at will. It is experience that it has shown itself moderate in the exercise of its essential function, that is of naming prices — but it is necessary for us to add that this is necessarily so, for it is not in its power to do otherwise.

"Whether the form of production is free or organized, scattered or centralized, the final laws which govern price always remain the same; trusts as well as industries working in competition must imperatively and before all else operate in conformity and relation with those more or less wide-spread judgments which constitute the necessary basis of monopoly as well as of competition prices, and which are their limit and their law.

"It is these judgments more or less correctly recognized, foreseen and discounted by the producer which guide him in the determination of the price at which he will with greatest advantage to himself offer his goods to the public * * *. This practically brings

E BLEED THRU

the question back to the terms in which it was formulated by Cournot many years ago — the thing primarily to be considered is the relation between *price* and *demand,* which is always an empirical or experimental relation, variable according to every class and kind of goods and which long familiarity with markets or patiently compiled statistics can alone determine. This view infinitely profound and just, only needs to be reduced to its psychological terms to be made clear and complete." (L'Ideé du Juste Prix, p. 352.)

MOLINARI:

"Monopoly is natural or artificial. Natural when the producer is the only one who can furnish the product which the consumer needs, and when his necessity for selling is less intense than the consumer's necessity for buying. Artificial monopoly is where the seller has the exclusive legal right to sell." (Theorie de l'Evolution, page 218.)

NICHOLSON:

"The simplest case of monopoly is when an individual possesses the whole stock of an article and the cost of production is so small that it may be neglected. Take the case, for example, introduced by Cournot, of some natural well having a unique character for its mineral water. The monopolist must in the first place endeavor to find out by experiment the law of demand for the commodity. If he fixes a very high price, he may sell none at all or only an occasional pint to a reckless millionaire, whilst if he fixes a very low price he may find that at that price he cannot provide the quantity demanded. In the first case he will increase his revenue by lowering, and in the second case by raising the price; and his object will be to discover what price will give him a maximum revenue. In this case the price will be such that the quantity sold multiplied by the price per unit will be a maximum.

"Even this simple case, however, presents difficulties. In the first place, although the monopolist sells to all customers at the same price, it is theoretically possible that two or more fixed prices might yield practically on the average the same return. The revenue of a

year with a high price and a small quantity might be exactly equal to that of a year with a lower price and a larger quantity.

"Again, it is also possible and indeed probable that the maximum revenue would be obtained by fixing different prices for different classes of consumers. The price charged might vary according to their wealth or apparent 'capacity to pay,' and it might also vary according to their ailments or apparent 'desire to possess.' If the monopolist were perfectly acquainted with all the circumstances he would obviously gain more by a series of special bargains than by fixing a uniform price calculated on the basis of an average demand.

"In fact it may be said that just as perfect competition (implying *inter alia* full knowledge of demand and supply) leads to equality of prices in the same market at the same time, so perfect monopoly (implying similar knowledge) naturally leads to differences of prices. This tendency to different prices is well exemplified in the partial or temporary and local monopolies of retail trade, and it is perhaps worth noting that, according to the doctrine of marginal utility and maximum satisfaction, the retail trader (like the monopolist) might promote his own advantage and also that of the public by charging two or more prices for the same quality of article. Monopolists, however, like other merchants, are not supposed to trade for the public good." (Principles of Political Economy, Vol. II, pp. 59, 60, 61.)

"The regulation of the supply of any commodity, to be really effective, involves also the regulation of possible substitutes. The same principle is involved as in the taxation of commodities; in order that one tax may be productive all possible substitutes must be taxed. This brings into view one of the principal objections to monopolies, e. g., patents of invention. The successful patentee may forestall by a very short time a number of similar discoveries which, if his patent is to be effective, must be suppressed.

"The maintenance of the real benefit of the monopoly also involves the power of adjustment of price and supply to any change in demand. The monopolist, in the face of a fall in demand, may, indeed, maintain his

minimum price, but in most cases he will no longer obtain the maximum return possible, and in some cases the maintenance of the price might involve an actual loss. Again, he may continue to turn out the same supply, regardless of the fall in price, and thus lose his reward. It follows, then, that things for which the demand is variable and the supply not capable of ready adjustment are not fit subjects for monopoly. (Id., pp. 65, 66.)

"The abuses under actual conditions of imperfect competition on the one side, and of excessive or rather specialized competition on the other, have been of late so abundantly illustrated that the distribution by the competition of individuals of the national wealth and the annual dividend may be likened to the principle of an Act of Parliament that has disappeared under a cloud of amendments. 'Any discussion' it is asserted in *Industrial Democracy* (vol. II, p. 688) 'of the relation of consumer and producer, or between capitalist, brain worker, and manual labourer, which is based on the assumption of a mutual exchange of services among freely competing individual bargainers, is from a practical point of view entirely obsolete. We have in fact to work out a new scientific analysis not of any ideal state of natural liberty, but of the actual facts of a world of more or less complete economic monopolies — legal monopolies, natural monopolies, monopolies arising out of the prejudices of the consumers, and last but not least, monopolies deliberately constructed by the tacit or formal combination or amalgamation of all the competing interests.' That 'monopolies' of the kinds indicated are still important elements in the industrial system may be readily granted; but it would be a grave historical error to suppose that at present even in the United States, the proportion of 'monopoly' to 'competition' is greater than at any former period, or that monopoly is a modern reaction against the excesses of modern competition." (Id., vol. III, pp. 206, 207.)

COMBINATION.

WEBSTER'S NEW INTERNATIONAL DICTIONARY:

Combination. (LL. *combinatio.*)

1. Act or process of combining, or state of being combined. "Images in the same combination." Johnson. "Making new compounds by new combinations." Boyle.

2. Result of combining; a union or aggregate made by combining one thing with another; specif., a union of mechanical parts or elements so that they co-operate to produce a practical result or effect.

3. Specif.; A union of persons; esp., a union or alliance of persons or states to effect some purpose:—formerly chiefly used as implying an intent to effect a purpose contrary to law. Now, usually, a union of persons to effect some purpose of an industrial or other economic nature, as in the case of syndicates, trusts, labor unions, or employers' associations, aiming to regulate production, distribution, sale, etc., in which the feature of illegality is still frequently to be seen; as *combinations* in restraint of trade.

NEW ENGLISH DICTIONARY:

Combination. (a. OF. combination (14th c. in Littre, mod. F. combinaison), ad. late L. combination-em a joining two by two, f. *combinaire* to COMBINE).

1. gen. The action of combining or joining two or more separate things in a whole.

1678. Cudworth *Intell. Syst.* Wks. 1837, I. 57. Words in great variety result from the different combinations and conjunctions of a few letters.

1712. Blackmore, Creation iv. Atoms * * * From which by various combination springs This unconfined diversity of things.

1847. E. Guest, in *Philol. Soc. Trans.* III. 27. Every combination in language is an act of the will and reason.

2. Combined state or condition of two or more things; condition of union, conjunction.

1597. Hooker Eccl. Pol. v. lxxviii, section 5. Neither ought it to seem less reasonable, that * * * a combination be admitted in this case, as well as division in the former.

1637. R. Humphrey tr. *S. Ambrose*, 1 121 Conjugal combination.

a **1716.** South (J.) Ingratitude * * * is always in combination with pride and hardheartedness.

1750. Johnson, *Rambler*, No. 36, p. 5. The same images in the same combination.

1875. H. Wood Therap. (1879) 482. Digitalis * * * is best given in combination.

1878. Jevons *Prim. Pol. Econ.* 40. When several men work at the same capstan, the combination is simple.

3. concr. Such a condition embodied in a group or set of things combined into a whole.

c **1532.** Dewes *Introd. Fr.* in Palsgr. 1053. The body * * * is but a conglutination and combination of the foure elementes.

1641. Hinde *F. Bruen* xxx. 94. Such assemblies * * * are for the most part * * * a combination of the Popish and prophane.

1779. Johnson, *L. P., Cowley*, Wks. II. 25. They produced combinations of confused magnificence.

1821. Craig *Lect.* Drawing iii. 142. Blue, red, yellow, and their combinations.

1853. Soyer *Pantroph.* 136. The cooks * * * could form unheard-of combinations with the succulent pieces.

b. An ecclesiastical plurality. Obs.

1618. Hales in *Gold. Rem., Lett. fr. Dort*, 4 the Impediments were * * * combination, that is, double benefices, when men having two cures could not sufficiently attend both.

4. The banding together or union of persons for the

prosecution of a common object; formerly used almost always in a bad sense — conspiracy, self-interested or illegal confederacy; hence (later), the term applied to the unions (formerly illegal) of employers or workmen to further their interests, affect the rate of wages, etc.

1593. Abp. Bancroft *Dangerous Positions,* 1. i. 7. By reason of their said combination and secretenesse vsed, many thinges lie hidde from those in authority.

1624. Capt. Smith, *Virginia,* iv. 146. (They) be a general combination in one day plotted to subuert the whole Colony.

1667. *Pepys Diary* (1877), V. 80. Some few * * * that do keep out of all plots and combinations.

1712. W. Rogers *Voy.* 235. I us'd what Arguments I could offer, shew'd the Danger and Folly of Combinations.

1776. Adam Smith W. N., I. ii. v. 371. Either by combination or by any other sort of violence.

1795. J. B. Bird (title). The Laws respecting Masters and Servants * * * comprising * * * the law respecting combinations amongst workmen.

1824. Act 5 *Geo. IV.,* c. 95. Workmen * * * shall enter into any Combination to obtain an Advance * * * shall not therefore be subject or liable to any Indictment or Prosecution * * * under the Common or the Statute law.

1826. Disraeli *Viv. Grey* III. iv. "Entered into a combination!" "Yes, Mr. Grey! a conspiracy!"

1845. *Penny Cycl. Suppl.* I. 398–2. Till then (1824) any combination of any two or more masters, or of any two or more workmen, to lower or raise wages, or to increase or diminish the number of hours of work, or quantity of work, to be done, was punishable at common law as a misdemeanour; and there were also thirty-five statutes in existence * * * prohibiting combinations of workmen against masters.

1856. Froude *Hist. Eng.* (1858), I. i., 17. A combination of three or four of the leading nobles was sufficient * * * to effect a revolution.

b. *concr.* An association or society thus formed.

1571. Hanmer Chron. Irel. (1633), 25. The second company of this combination.

1597. Bacon *Ess. Hon. & Reput.* (Arb.) 68. As * * * hee doe content euerie faction or combination of people.

1725. De Foe *Voy.* round World (1840), 46. To form other societies or combinations.

1818. Jas. Mill, *Brit. India,* 111. ii., 79. Pardon is commonly granted to any one of a combination who gives evidence against the rest.

1833. *New Monthly Mag.* XXXVIII. 51. Some combinations have framed rules to prevent men from having above a certain number of apprentices.

c. Agreement, treaty, alliance, compact. Obs.

1601. *Shaks. Twel. N.,* v. i., 392. A solemne com bination shall be made Of our deere soules.

1613. *Henry VIII,* 1. i., 169. This cunning Cardinall The Articles o' th' Combination drew as himselfe pleas'd.

STANDARD DICTIONARY:

Combination. 1. A joining together so as to fŏrm a whole, or the whole produced by combining; a conjunction; as, a combination of letters; a *combination* of good and bad.

Nature is an endless combination and repetition of a very few law. Emerson Essays, History first series, p. 20.

He had that mental *combination* which is at once humble in the region of mystery and keen in the region of knowledge. George Eliot, Adam Bede, ch. 4, p. 43.

2. The union or alliance of persons for the prosecution of a common object; also, the association thus formed; formerly almost always with the implication of confederacy, as of employers or workmen, for illegal or interested ends.

Combinations for use of means of communication and transportation made railway service cheap. R. T Ely, *Intro. to Polit. Econ.,* pt. v. p. 276.

CONSPIRACY.

WEBSTER'S NEW INTERNATIONAL DICTIONARY:

Conspiracy. 1. Act of conspiring; combination of men for evil purpose; an agreement between two or more persons to commit a crime in concert, as treason; a plot.

"I had forgot that foul conspiracy
of the beast Caliban and his confederates." Shak.

2. A concurrence, or general tendency, as of circumstances, to one event; harmonious action.

"A conspiracy in all heavenly and earthly things." Sir P. Sidney.

3. Law. An agreement, manifesting itself in words or deeds, by which two or more persons confederate to do an unlawful act, or to use unlawful means to do an act which is lawful; confederacy.

NEW ENGLISH DICTIONARY:

Conspiracy. (f. L. *conspiratio* Conspiration, with substitution of the ending Acy q. v. A single example of *conspiratio* in the 16th c. F. is given by Godefroy.)

1. The action of conspiring; combination of persons for an evil or unlawful purpose.

2. (with a and pl.) A combination of persons for an evil or unlawful purpose; an agreement between two or more persons to do something criminal, illegal, or reprehensible (especially in relation to treason, sedition, or murder); a plot.

3. fig. Union or combination (of persons or things) for one end or purpose; harmonious action or effort; Conspiration 3. (in a good or neutral sense). Obs. or arch.

STANDARD DICTIONARY:

Conspiracy. 1. An agreement between two or more persons to do an evil act in concert; particularly, a combination to commit treason, or excite sedition or

insurrection; any plot; secret combination of men for an evil purpose; as, a conspiracy against the Government. 2. Crim. Law. A combination between two or more persons to commit any act punishable by law, or to effect a legal purpose by criminal or unlawful means. 3. Any striking concurrence of persons, classes, or agencies; especially, a combination to surprise without any evil intent; as, a conspiracy of the elements.

"The sweet conspiracies of old and young;
The Christmas-tree, with its surprising fruits."
Trowbridge Book of Gold, pt. i. st. 17.

"CYC."

Conspiracy. The principles of Conspiracy have become so fundamental a legal concept as to call merely for statement and not to require discussion — and there can be no doubt that the term was used in the statute in its precise legal sense and not as a vernacular term any more than were the words, e. g., "combination" or "commerce."

A conspiracy "is a combination between two or more persons to do a *criminal or an unlawful act* by criminal or unlawful means * * * To constitute a conspiracy there must be unity or design of purpose, for the *common design is of the essence of the conspiracy* * * * There must be *intentional participation* in the transaction *with a view to the furtherance of the common design and purpose.* * * * If the object of the combination is unlawful the means contemplated to effect such object are immaterial * * * Where however the object of the conspiracy is not unlawful, the object is immaterial and the illegality of the means used or intended to be used constitutes the offense. Where the object in view is lawful and no unlawful means are used there can be no prosecution for conspiracy, nor any civil action * * * In order that a combination may be punishable it must be formed either to do any unlawful act or a lawful act by criminal or unlawful means * * * It will be enough if they are corrupt, dishonest, fraudulent or immoral and in that sense illegal * * * According to all the authorities the conspiring together is the essence of the charge." (Encyclopedia of Law, tit. Conspiracy.)

COMPETITION.

WEBSTER'S NEW INTERNATIONAL DICTIONARY:

Competition. (L. competitio). 1. An act of seeking or endeavoring to gain what another is endeavoring to gain at the same time; common strife for the same object; strife for superiority; emulous contest; rivalry, as for approbation, or for a prize; as, competition with a person for an act sought.

"Competition to the Crown, there is none, nor can be."—Bacon.

"There is no competition but for the second place."—Dryden.

2. Com. & Economics. The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms; also, the relations between different buyers or different sellers which result from this effort.

"Where competition does not act at all there is complete monopoly."—A. T. Hadley.

STANDARD DICTIONARY:

Competition. 1. The act of proceeding or striving for something that is sought by another at the same time; a contention of two or more for the same object or for superiority; rivalry, as between aspirants for honors or for advantage in business.

"Man is the rival of other men; he delights in competition, and this leads to ambition which passes too easily into selfishness." (Darwin, Descent of Man, vol. ii, pt. ii., ch. 19, p. 311.)

NEW ENGLISH DICTIONARY:

Competition. (ad. L. competition-em agreement, a judicial demand, rivalry, n. of action, f. competere: see Compete).

1. " The action of endeavoring to gain what another endeavors to gain at the same time " (J.); the striving of two or more for the same object; rivalry. Now largely used in connexion with competitive examinations.

a **1608.** Sir F. Vere Comm. 26. Though there were grudging there could be no competition.

1671. Milton Samson 476. God * * * will not long defer To vindicate the glory of his name Against all competition.

1697. Collier Ess. Mor. Subj. 1 (1709) 150. Where there is so much of * * * Competition, and Uncertainty, you must expect Self-interest will govern.

1859. Mill Liberty iii. (1865) 43/1. Opening all objects of ambition, even the highest, to general competition.

1868. M. Pattison *Academ. Org.* 65. It is useless for real genius to enter the lists of competition without this training. Mod. The place will be filled by open competition. * * * These scholarships are now thrown open to general competition.

b. Commerce. Rivalry in the market, striving for custom between those who have the same commodities to dispose of.

1793. Bentham *Emanc. Colonies* Wks. (1843) IV. 412. From high profits in trade comes influx of traders — from influx of traders, competition among traders — from competition among traders, reduction of prices.

1823. Ht. Martineau *Each & All* iii. 39. Competition is more likely than co-operation to induce prudence and foresight.

1871. Ruskin *Nunera* P. Pref. (1880) 13. Vulgar political economy asserts * * * that wares are determined by competition.

1884. *Pall Mall G.* 26 Feb. 12/1. The war of commerce, which, under the name of " competition," goes on unceasingly. Mod. Maxim. Competition is the life of trade.

c. In Sc. Law applied chiefly to those contests which arise on bankruptcy, between creditors claiming in virtue of their respect securities or diligences.

d. Const. for; formerly also to.

1624. Williams in *Fortescue Papers* 204. In the competitioin for soe unworthy and meane a remote northerne Deanerye.

a **1626.** Bacon (J.). Competition to the crown there is none nor can be.

a **1700.** Dryden (J.). Now * * * there is no competition but for the second place. Mod. The competition for the appointment will no doubt be severe.

e. In, into competition.

1605. Bacon Adv. Learn I. viii. Sec. 4. The Priesthood, which ever hath been in some competition with Empire.

a **1631.** Donne in Selections (1840) 200. Bring the honours of this world into the balance, into competition, into comparison with that eternal weight of glory in heaven.

1660. R. Coke *Just. Vind.* Ep. Ded. 5. No man presumes to stand in competition with you.

1728. Morgan Algiers I. iii. 70. They are a very small inconsiderable Tribe, in competition with those I treat of.

1786. Mrs. Inchbald, *I'll tell you what* II, ii. You wou'd not, even in idea, put him in competition with me.

1841. Myers *Cath. Th.* III. Sec. 28, 104. The higher claims of the older Law are not to be put into competition with that Dispensation.

DEFINITION.

WEBSTER'S NEW INTERNATIONAL DICTIONARY:

Definition. (definitio: cf. F. definition). 1. Limitation; setting of limits. Obs.

2. A determination; decision. Obs. or R.

3. Act of making definite or clear; specif., the capability of an optical instrument to form distinct and sharply defined images; as, the *definition* of a telescope.

4. Condition of distinctness of outline and precision in detail, as of an image formed of an optical instrument.

"They sometimes so swathe the peaks with light as to abolish their definition." Tyndall.

5. A description of a thing by its properties, or of a conception by its attributes; a brief explanation of the meaning of a word or term; such an account as intelligibly relates the idea defined to analogous or related ideas. Formally, a definition consists of a statement of the class in which the subject of definition is included, and an enumeration of the differentiæ, or specific marks or traits, which distinguish it from other members of the same class. A definition is *adequate* or *exact* when the differentiæ make certain the identification of the object intended.

"*Definition* being nothing but making another understand by words what the term defined stands for." Locke.

"The *definition* of a name * * * is the sum total of all the essential propositions which can be framed with that name for their subject." J. S. Mill.

STANDARD DICTIONARY:

Definition. 1. Such a description or explanation of a word or thing, with reference to its constitution, attributes, appearance, or relation to other like things, as serves to distinguish it from all other things; as, a definition of the word "war"; a definition of an apple.

Definition may be (1) rhetorical, in which case it gives the meaning loosely, and freely uses accidental, relative, and extrinsic properties. This form includes (a) etymological definition, which depends on the meaning of the root of the word; (b) analytical definition, by combining and unfolding the roots of various elements of the word; and (c) descriptive definition, as by giving concrete characteristics or synonyms or by the casual substitution of phrases. Some words can only be defined thus. Or (2) it may be logical, in which case the conception expressed is separated from all others by presenting its essential qualities. Perfect logical definition has two forms, according as it regards the general term (a) as a *class term* or (b) as a *concept term.* In the former the definition must give the *next higher genus,* and the *difference;* in the latter the *properties* of the higher genus and the *properties* which distinguish the concept as a species from other species. Imperfect logical definition includes definition by (1) division, (2) colligation, (3) resolution, and (4) composition. From still another point of view definitions are classified as *nominal, real* and *genetic,* as they have to do with mere names, essentials or causes.

"Here are three sources of vague and incorrect definitions, indistinctness of the object, imperfection of the organ or perception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity." The Federalist, No. xxxvii, p. 165.

"We must give a definition the briefest possible statement of such qualities as are sufficient to distinguish the class from other classes." W. S. Jevons Lessons in Logic, p. 109.

BLEED THRU

2. The act of stating or showing what a word means, what a thing is, or what the content of a conception is; the act of defining.

3. The state of being definite; fixed shape; definitiveness.

"The sunset covered the crest of the Eiger with indescribable glory * * *. It gave definition to a vague desire I had previously entertained to climb the mountains." (Tyndall *Hours of Exercise,* ch. 23, p. 265.)

4. The settling, marking out, or determining of the boundary or limits of a thing, or the state of being so determined; in optics, used specifically of the power of a lens to give a clear, distinct image; as, the definition of the telescope was perfect.

"The day was clear, and every mound and peak traced its outline with perfect definition against the sky." (Holmes Pages from an Old Volume, ch. 7, p. 255.)

Supreme Court U. S.
FILED
JAN 19 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 118.

UNITED STATES OF AMERICA,
Appellant,

against

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Appellees.

ORAL ARGUMENT OF WILLIAM B. HORNBLOWER, ON BEHALF OF THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, LIMITED, APPELLEE.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

U. S. Supreme Court.

THE UNITED STATES vs. AMERICAN TOBACCO COMPANY and others.	No. 118.

ARGUMENT OF WILLIAM B. HORNBLOWER

On Behalf of the Imperial Tobacco Company.

JAN. 10, 1911.

MR. HORNBLOWER. If your Honors please: I appreciate the burden that is imposed upon this Court by these oral arguments, and shall endeavor to take as little time as possible in the argument of this case. At the same time, I also appreciate that it will be almost if not quite impossible for this Court to read every single word in this voluminous record, together with the still more voluminous record that is to come before this Court in connection with the Standard Oil case; and I also appreciate the burden imposed upon the Court by the enormous briefs that have been submitted. Therefore I take it that it is the duty of counsel to relieve the Court as far as possible of the burden of examining records by pointing out precisely the salient points on which counsel rely.

The Imperial Tobacco Company is no small affair. It is true it does not rival the tremendous assets and capital of the American Tobacco Company. But it has a capital of $90,000,000; and that capital is largely invested in the purchase of

American tobacco. It imports to-day, according to the Government, 54,000,000 pounds of our tobacco annually.

The learned counsel for the Government, the Assistant to the Attorney General, drew a picture of the situation in 1902. He stated that at that time the Imperial Company was exporting manufactured tobacco to the United States and to every country of the world. True; but the mental picture conveyed to your Honors was quite incorrect. He would apparently have had your Honors understand that we were importing into this country great stocks of merchandise; that the American Tobacco Company was trembling in its shoes lest we should take away their American trade; and that that was the motive on the part of the American Tobacco Company in entering into these contracts with the Imperial Company.

So far from the fact being that the Imperial Company was shipping to this country enormous quantities of goods, the fact was that the total amount of English manufactured tobacco imported into this country in the year 1902 was only 150,000 pounds, by all the companies—the Imperial and all the others, as against, as I remember it, one hundred and fifty million pounds manufactured in this country. At any rate, the amount imported into this country was, as we have figured it out on the brief, less than a thousandth part of the amount manufactured in this country. So that it could not have affected in any way appreciably the price of tobacco in this country.

150,000 pounds a year sounds large. Divide it by days, and it is absolutely trivial. 150,000 pounds a year is 500 pounds a day—500 pounds a day imported into this great country.

Why, that amount of tobacco could be put on this table, and be carried by three men. Yet that was all the tobacco imported daily into this country. And you would have had to take a search party and search the wharves of New York from one end to the other to discover it.

We have no connection with the American Tobacco Company outside of these two contracts which are printed in this book, and which are a part of the petition; the contracts being Exhibit 1 and Exhibit 2. The American Tobacco Company never owned more than eighteen per cent of the stock of the Imperial Tobacco Company. Did they own

that stock for the purpose of controlling the Imperial Company and thereby enlarging their domain? Not at all. They got that stock for the sale of Ogden's, Limited; and so far from purchasing it for the sake of getting control, they immediately proceeded to sell it. So that to-day, as stated by counsel (this being one of the few things in which my learned friend and I agree on the facts), they own less than five per cent. of the capital stock of the Imperial Company.

MR. JUSTICE HARLAN: Who owns the balance of the stock?

MR. HORNBLOWER: The English people. It is all scattered in England. Not a single share of stock in the Imperial Company is owned by any officer, director, or stockholder of the American Tobacco Company, except the stock that is owned by the three directors who are made directors by the agreement of September, 1902. Three directors out of twenty-eight, your Honors! That is all that this grasping American Company got out of us—three directors. And the evidence shows that of those three directors, only one has ever attended a meeting of the Board of Directors of the Imperial Company, and he attended it because he was connected with the Ogdens, Limited, is an Englishman living there, and is more interested in the Imperial than he is in the American Company.

So that there is no control exercised by the American Company over the Imperial Company. It has no right to control the board of directors; it does not own stock sufficient to elect a board of directors; and it has no director on the board except these three men who are nominally members of that board by reason of this agreement.

If your Honors please, this Company stands here to-day as appellee. The bill was dismissed by the Court below as to us and as to the British-American Company; and I stand here to sustain that decree. Every presumption is, therefore, in my favor.

The specific ground on which the bill was dismissed by the Court below as to these companies, the Imperial Company and the British-American Tobacco Company, was that these companies are British companies; that the contracts which are attacked in this suit were made in England, where the contracts were valid. They were actually executed in London. Certain officers and directors of the American Tobacco Company went

over there and negotiated with the officers of the Imperial Company, and the agreements were executed there. And further, on the ground that the only business carried on under the contracts in this country is the business of buying and shipping leaf tobacco, and that the Sherman Act should not be construed so as to require such purchases to be enjoined.

If your Honors please, if the Government have their way, we are to be enjoined from buying another pound of tobacco from the American producer; we are to be enjoined from buying any of that 54,000,000 pounds that we are buying now, and the British-American Company are to be enjoined from buying the 30,000,000 pounds of tobacco that they are buying to be shipped abroad. That naturally staggered the court below, and the court below said that if the Sherman Act required that that should be done they did not so construe it. The opinion of Judge LACOMBE in the court below says:

"It may be an enlightened public policy to prohibit an alien corporation from buying its raw material in this country unless it sends its products here to compete with American manufacturers; but if it be this Act seems not to have gone to that extent."

The first point, therefore, to which the attention of your Honors is to be directed, is to the operation of the Act as limited to the United States.

On this point let me guard myself from misconstruction. I do not claim, and never have claimed, that the mere fact that the Imperial Company is a British Company protects it from the operation of the Sherman Act, so far as concerns its business in this country. Nor do I claim that the mere fact that the written agreements in this case were made in England protects the agreements from the operation of that Act. I concede that if the agreements were made with the intent to restrain trade with this country, or in this country, or if they are so acted on within this country as to violate the Sherman law, the Sherman law can be applied to the extent of enjoining the further carrying out of these agreements in this country. I do claim, however, and do insist, that so far as concerns restraint of trade within the United Kingdom, or between the United Kingdom and other countries than the United States, the Sherman law has no application. It is not within the scope

and purpose of the Act to protect the people of Great Britain, or the people of any other country of the world. The wildest dream of ultra-paternalism does not as yet extend its scope to protecting the people of foreign countries from restraint of trade and monopoly.

It is only so far as restraint of trade affects American interests, or creates or tends to create an American monopoly, that the Sherman Act can be held to apply.

Of course it is only so far as commerce between the States of the United States and foreign countries is affected that the Sherman Act finds its constitutional justification. I should not deem it necessary to dwell upon this point, which seems to me to be self-evident, were it not that the bill avers that the Imperial Company controls a monopoly in the British Isles, and was created for this purpose ; and that the purchase of the Ogden's, Limited by the Imperial Company under the agreement of September, 1902, put an end to the fierce competition between those two companies in the United Kingdom.

On the general question of the non-extra-territorial character of the Sherman law, it was held in the American Banana case, 213th U. S., in the opinion by Mr. Justice HOLMES, that—

" The prohibitions of the Sherman anti-trust law of July 2, 1890, do not extend to acts done in foreign countries even though done by citizens of the United States and injuriously affecting other citizens of the United States."

So far, therefore, as the agreement of September, 1902, between the Imperial Company and the American Company for the purchase of the Ogden's, Limited, tended to create a monopoly in Great Britain, or tended to restrain competition in Great Britain, it is clearly not within the scope of the Sherman Act, and would not be invalid under that Act, even if it would be invalid under the Sherman law as between citizens of this country and as to trade within this country.

One word as to the Wilson Act : I take the ground that the Wilson Act does not apply to these corporations.

This Act evidently has relation to contracts which were to be made in restraint of competition in importations. It provides that no corporation which is engaged in importing shall make a contract in restraint of competition. Then follows con-

siderable verbiage, and it winds up with the phrase, "any article or articles imported or intended to be imported into the United States."

The manifest purpose of the Act, as the manifest purpose of the Wilson bill as a whole, was to regulate the matter of importations. And, therefore, in order to have any bearing upon this case, the Wilson Act must be shown to affect a contract with regard to importations.

So far as the British-American Company is concerned, it is conceded that that Company does not and never has imported, and was not formed for the purpose of importing, but exporting. So far as the Imperial Tobacco Company was concerned, I shall show your Honors still more fully in a few minutes that it was not engaged in importing in any sense. And so far as the American Tobacco Company was concerned, it was not importing, but exporting, except so far as concerned importations from Porto Rico or Cuba, which have nothing to do with this matter, which concerns the Imperial Tobacco Company.

Now, if your Honors please: I have spoken of the point that the Sherman Act has no extra-territorial application. We do not, however, rest our case entirely on the point of the non-extra-territorial nature of the contracts attacked. We claim that even if these contracts had been made in the State of New York between corporations created under the laws of one of our States, they would not be invalid, taking into consideration the proof in this case.

First let me consider the contract between the Imperial Company and the American Company for the purchase of the Ogden's Limited, and containing covenants not to compete.

This is attacked under the first section of the Sherman Act as being in restraint of trade because in restraint of competition. For the purposes of my case I shall concede that "restraint of trade," as used in the Sherman Act, does mean "restraint of competition." Whether it does or not, I do not pretend to say. But I shall assume that that is what it means.

I take it, however, that there are some things perfectly well-settled as to the first section of the Sherman Act. I shall endeavor not to travel over the ground which has been so fully and ably covered by counsel for the American To-

bacco Company as to the real meaning and intent of the Sherman Act in both its sections. But I do wish to point out to the Court certain propositions which I claim stand settled to-day by the decisions of this Court under the first section of the Sherman Act.

The *dicta* of Mr. Justice PECKHAM in the Trans-Missouri case and in the Joint Traffic case, the language of the concurring opinion of Mr. Justice BREWER in the Northern Securities case, the unanimous decision of this Court in the Cincinnati Packet Company vs. Bay case in 200th U. S., the *dicta* in other cases in this Court, the decisions of the lower Federal courts, and the decisions of the State courts as to the Sherman law cited in our brief, all establish the following propositions: And I may say in passing that the *dicta* of Mr. Justice PECKHAM in the Trans-Missouri case as originally pronounced were evidently misunderstood and misconstrued; and he found it necessary and desirable, when writing the opinion of this Court in the Joint Traffic case, to explain more fully what was intended to be decided by the Trans-Missouri case; so the two cases must be read together.

These principles which I claim are established by the *dicta*, taken together, of the Trans-Missouri case and the Joint Traffic case and the decision in the case of Cincinnati Packet Company vs. Bay, are these:

1. Nothwithstanding the language "every contract in retraint of trade"—

MR. JUSTICE DAY: Before you begin to read those conclusions, let me inquire whether you have summarized them in your brief somewhere?

MR. HORNBLOWER: No, sir; I have not. I have discussed the subject at great length, and referred to the cases; and I simply give this summary in order to save the Court the burden of—

MR. JUSTICE DAY: I ask the question in order that I may have the benefit of the summary after you have retired from the discussion. I did not know but that it was in your brief.

MR. HORNBLOWER: No; it is not. This is something that I wrote down last night as my summary of what the net result of the decisions of the courts to-day is on this first section of the Sherman Act, taking all the cases together, and taking a composite picture of them.

THE CHIEF JUSTICE: I do not want to interrupt the course of your argument, Mr. Hornblower; but the record is enormous in this case, and the briefs are very large; and I notice that both Mr. McReynolds and yourself and the counsel who preceded you have not followed the lines of their briefs. Of course in following an argument the mind gets a co-ordinated impression of the case according to the line of the argument. Are these arguments going to be supplied to us on all sides?

MR. HORNBLOWER: I take it that they will be printed.

MR. WICKERSHAM: If the Court desires it, we will certainly do that. After the last argument some of the arguments were printed, and I think perhaps all of them were furnished to the Court.

THE CHIEF JUSTICE: If that will be agreeable to counsel—

MR. WICKERSHAM: It will be entirely agreeable.

MR. HORNBLOWER: We have a stenographer here.

THE CHIEF JUSTICE: If it will be agreeable, we should be glad to have them. Of course I do not mean, in giving that suggestion, that counsel should use that suggestion as a means of writing new briefs, because they have written some briefs in this case already.

MR. WICKERSHAM: For that reason we hesitated to burden the Court with any more printed pages. But if the Court would be aided or might be aided by it, I know we would all be glad to supply it.

THE CHIEF JUSTICE: We are following these arguments closely; and if everybody will give us the arguments (if they can do so without great inconvenience) I think it would facilitate the work of the Court, and we should be very much obliged.

MR. WICKERSHAM: We shall all have that done, your Honor.

MR. JUSTICE DAY: A summary of this kind might be rather in the interest of brevity, you know.

MR. WICKERSHAM: Perhaps we could on both sides aid the Court more by preparing a summary after these oral arguments.

THE CHIEF JUSTICE: Oh, no; it would be apt to be more than a summary when finally prepared. There is a point where a thing ceases to be a summary and gets to be an expansion. While I merely suggest it, I think that if counsel will give us

their arguments just as they have given them to us orally, we shall be very much obliged.

MR. WICKERSHAM: I know all counsel will be very glad to do so.

MR. HORNBLOWER: We shall be glad to do so, your Honor.

THE CHIEF JUSTICE: We shall be very much obliged if they will.

MR. HORNBLOWER: We have a stenographer employed for the purpose of taking down the arguments.

THE CHIEF JUSTICE: Excuse me for interrupting you.

MR. HORNBLOWER: Certainly.

The first proposition is this: Notwithstanding the language "*every* contract in restraint of trade," and notwithstanding the interpretation placed upon the act that it means restraint of *competition*, yet it is not true that every such contract is void; but there are various exceptions that must be made in order to make the Act workable.

I think perhaps it would have been better if Mr. Justice PECKHAM had had in mind what was very fully pointed out by the present Chief Justice in his dissenting opinion in that case. That is, that the words "restraint of trade" had a definite technical meaning; and that at common law there were valid restraints of trade and invalid restraints of trade; but that any contract which was valid at common law was not a contract in restraint of trade within the meaning of that law, which was intended to prohibit unlawful contracts in restraint of trade. But even Mr. Justice PECKHAM, in the very extreme position which was taken in the Trans-Missouri case, did say that there were some exceptions to be made. And among the exceptions which he named was this:

2. One of these exceptions is a contract for the purchase of a business with covenant against competition.

If there is anything that can be said to be settled beyond the shadow of a doubt, that is the proposition that is settled about this law—the very point decided in the decision in 200th U. S.

3. A manufacturer has the right to buy off a dangerous and aggressive rival. That seems to be somewhat of a contradiction in terms; yet it is true. It has been held by the courts to be true—not by this Court in those words, but by the circuit courts in those very words.

4. And this has been held by a perfectly overwhelming line of cases. If the main object, the principal object and intent, is to protect the business interests of the parties, and only incidentally to restrain trade, the contract is legal. That was held in the Whitwell case (125 Fed. Rep.), and was held in numerous subsequent cases.

In order to ascertain what was the main object of this contract—whether the main object was to protect the business interests of the parties, or was to restrain trade—we must inquire what was the situation of the parties at the time when these contracts were made, and what was the primary purpose and object of the contracts?

As I have already stated, your Honors would get the impression from Mr. McReynolds' illuminating argument that these concerns were rivals in the business in the United States; and that when the American Company undertook to sell to the Imperial Company and the Imperial Company undertook to buy from the American Company Ogden's, Limited, the object was to put an end to competition in this country. As a matter of fact, however, the evidence shows conclusively, and it is, in fact, conceded by the Government (although not stated orally to your Honors) that owing to the protective tariff in this country and the internal revenue tax in this country which is added to the protective tariff on goods imported, and owing to the differential in Great Britain between raw material and manufactured products, it was impossible for either the American companies to compete in England with the English companies, or for the English companies to compete in America with the American companies. This is very fully explained by Mr. Duke in his testimony, Volume 4, pages 451 and 452. It had already been explained fully by Mr. Harris, one of the vice-presidents of the American Tobacco Company, and the Chairman of the British-American Company, who was called by the Government as a witness. Mr. Duke was asked about this matter, and this is his testimony:

> "Q. What is the meaning of the term differential as applied to the English duties frequently referred to in the testimony in this case?
>
> "A. Well, it is the difference between the duty on the raw material and the manufactured article.

"Q. It discriminates in favor of the raw material and against the imported manufactured article?

"A. Yes, sir."

That seems to be a roundabout way for our British brethren to arrive at something like a protective tariff on tobacco.

"Q. And that is true of manufactured tobacco?

"A. Yes; that is for instance the duty on raw leaf is 72 cents per pound, or they put it in shillings and pence, but it makes in our money about 72 cents and they allow manufacturers to have about 30% moisture on them and he gets his leaf in at 10% of moisture so that he has the advantage of 20% moisture.

"Q. And a smaller duty beside?

"A. Yes; then the manufactured tobacco of cigarettes I think is 96 cents a pound, so that makes quite a large difference.

"Q. Now what was the effect of that?

"A. The effect of that practically is to prevent manufacturing goods in this country and successfully selling them in England.

"Q. Was that the reason that the American Tobacco Company purchased Ogden's?

"A. Yes, sir.

"Q. Because of this differential preventing the American manufacturer exporting his goods or importing his goods into England and selling them there profitably in competition with the English manufacturers?

"A. He couldn't do it; he could only do it at a fancy price and we found we were losing all the trade we had in England and we went there with the idea of manufacturing the goods there so that we could hold our trade and increase it.

"Q. What was the situation with respect to the English manufacturer desiring to import his manufactured tobacco product into the United States and selling it there in competition with our domestic manufacturer?

"A. He could not successfully do it only in a fancy way.

"Q. Why was that?

"A. On account of our duty here, 35 cents a pound and I forget now whether it is *ad valorem* tax. I don't know whether that is the tax of the manufactured article; it is 35 cents on leaf."

Then he goes on to say that that is practically prohibitive of trade in the manufactured article, and that practically only negligible quantities can be introduced.

So the result was that in 1902 there were no manufactured products imported into this country from England except certain cigarettes and smoking tobacco which were sold at fancy prices because they bore fancy labels or trade-marks or names; and certain people had an idea that they were superior, and paid fancy prices for them.

But that could not affect the American Company in any way. As I have already said, 500 pounds a day was all there was coming into this country. Your Honors can readily see that that must have been so; that it must have been an inappreciable amount, because the English manufacturer had to pay the freight on the raw material to England, and then freight on the manufactured product back here, and then customs duties, import duties, and then the internal revenue tax, and then sell his product in competition with the American Tobacco Company. So that the American Tobacco Company was protected from foreign competition by the benevolent act of the United States Government; and it did not need to protect itself by contract.

The learned counsel for the Government has told you that the working of this differential in England had made it impossible for the American Company to export to England, and that that was the reason why in 1901 they went to England and bought this Ogden's, Limited. The total product of cigarettes in this country in 1902 amounted to approximately 9,000,000 pounds, and the total product of smoking tobacco amounted to 131,000,000 pounds. So that the total number of pounds of the American product, both cigarettes and smoking tobacco, in the United States in that year was approximately 140,000,000 pounds. The amount of cigarettes and smoking tobacco imported from England into this country, as I have stated, was less than 150,000 pounds, or a little more

than one-thousandth part of the American product with which it would have come into competition—which, of course, is a negligible quantity.

MR. JUSTICE HARLAN: Have you the figures about chewing tobacco?

MR. HORNBLOWER: There are none. The English people do not use our chewing tobacco. There is no plug exported from this country.

The Imperial Company never manufactured chewing tobacco. I believe I am right about that. The Imperial Company did not manufacture chewing tobacco, and I understand that the English people do not use chewing tobacco to any considerable extent; and that the only demand for plug tobacco in England is by Americans who are sojourning in England and want their home comforts and luxuries. But the evidence is that there was no exportation or importation of plug tobacco in 1901 or 1902, and there was no exportation of cigars from England to this country. The only tobacco products that were imported into this country from England were cigarettes and smoking tobacco; and those were sold at fancy prices under fancy labels.

So the situation was that in 1902 there was no competition between the Imperial Company on the one hand and the American Company or any other defendant on the other, except so far as concerned the business carried on by the Ogden's, Limited, in England in the interest of the American company.

It is evident, therefore, may it please your Honors, that what the officers of the Imperial Company and the American Company had in mind when they executed the agreement in September, 1902, was not to put an end to competition between the two companies in manufactured products in the United States either by way of exportations or importations; but was solely to put an end to the injurious competition in England between the Ogden's, Limited, and the Imperial Tobacco Company.

That such competition was fierce is very clearly set forth by the Government in its brief, and in the oral argument of Mr. McReynolds. As I have stated, it was found by the American Company, in 1901, that it was impossible, owing to the differential in England, to export its American-manu-

factured products to England and sell them in England in competition with the English-manufactured products. And it was because of the impossibility of profitable competition in England in exported tobacco products that the American Company purchased the Ogden's, Limited, an English company in Liverpool, in order that it might manufacture tobacco in England, and thus successfully compete with the English.

A large number of the old established English manufacturers, in order to protect themselves against the fierce competition which was carried on by the Ogden's, Limited, formed the Imperial Company. That Company has been called by our learned friends on the other side "the English trust." There is, however, no evidence whatever that that company has in any respect any of the features of a trust, except that it has purchased and become the owner of a large number of English manufactories of tobacco products. That it has a monopoly in England is charged in the bill; but it is denied, and there is no proof on the subject. That is true of most of the charges in the bill so far as the Imperial Company is concerned. There are liberal charges made against us, but no proof.

One of the charges is that the Imperial Company has a monopoly in England. There is no proof on the subject. It is denied by the answer. That it has acquired the property which it holds by any unfair dealings is not claimed. The only ground for claiming that it is a trust is its size; and even this is not accurately shown by the evidence.

Whatever the facts may be with regard to this matter, however, they can have no bearing on the questions involved in this suit except by way of creating a prejudice in the minds of the public against anything that was done by that Company. Call any company a "trust," and the public is prepared to believe anything against it.

At any rate this Company was formed in October, 1901—that is, the Imperial Company. There ensued, as the Government admits and avers, a fierce trade competition in the nature of a life-and-death warfare between the Ogden's, Limited, on the one side, and the Imperial Company and the British companies on the other—not an ordinary competition, but a fierce cut-throat competition, so that one or the other

must die. The Ogden's, Limited, went so far as to divide its entire profits for four years among the people dealing with it, besides large bonuses; and it is charged that the Imperial Company also distributed large bonuses. Of course it had to.

It is evident that this fierce competition could but ruin both companies unless it was stopped in some way; and it was for the purpose of putting an end to such ruinous competition, which benefited no one, and for no other purpose under heaven, that this purchase of the Ogden's, Limited, was made —not to violate the Sherman law, but to preserve the life of the Imperial Company.

The maxim that "competition is the life of trade" is in a sense true. But when competition reaches the point of selling all products below cost, and giving away all profits and huge bonuses, then competition becomes the death of trade.

The right of one of two rival manufacturers to put an end to such ruinous and cut-throat competition by purchasing the plant and good-will of the rival company, and taking a covenant from the rival company to cease competition, is not only justifiable in morals, but is necessary to the protection from destruction of specific business interests; and this has been recognized by the courts over and over again.

As was said by the United States Circuit Court in the case of United States Chemical Company vs. Providence Chemical Company, in 64th Federal Reporter:

> "The defendant had a perfect right to buy off the competition of a dangerous, powerful and aggressive rival."

Talk about suppressing competition! Why, that is one of the very rights that a party has—to suppress competition by proper compensation, purchase and covenants.

It is further said in the case of Carter vs. Alling, in 43d Federal Reporter:

> "A manufacturer has the right to protect his business from piratical competition by contracts like the one under consideration."

By the agreement (Exhibit 1) of September 27, 1902, annexed to the bill and attacked by the Government in this suit,

the Imperial Company purchased and bought off the competition of the Ogden's, Limited. The business purchased was carried on entirely in England; and in consideration of the purchase the vendor company and the American companies which were allied with it entered into a covenant not to compete in Great Britain.

This covenant, even if made within the United States and with regard to business in the United States, would have been within the exceptions laid down by this Court to which I have heretofore called attention, and by the other courts, and would not have been repugnant to the Sherman Act. But counsel for the Government say that not only was a covenant given by the vendor to refrain from competition in Great Britain, but that there were covenants by the vendee company to refrain from competition in the United States.

I have already pointed out to your Honors several times the insignificant nature of any business that was, had been, or could be done in the United States in view of the protective tariff and the internal revenue taxes also imposed upon imported goods.

Your Honors cannot read the evidence in this case without seeing that the controlling motive of the American Tobacco Company in entering into the agreement could not have been to protect itself from competition in America; for there was none to protect itself from. Even, however, if that had been the motive, I am not prepared to concede that that would have made the contract invalid.

The situation was that the American company was attempting to squeeze the life out of the English companies on their own soil, by making it impossible for them to sell their products except at a ruinous sacrifice. That the Imperial Company was justified in purchasing its peace and in purchasing the Ogden's, Limited, and in obtaining from the Ogden's, Limited, and from the American Tobacco Company an agreement to refrain from competition in England, is, I think, beyond question. And if, in view of this, the American Company exacted a covenant from the Imperial Company to refrain from competition in the United States, and made that an essential condition of the sale of the Ogden's, Limited, I still think that the Imperial Company was entirely justified, in morals and in law, in making that agreement.

As a matter of fact, there was a double purchase. Both companies were in the position of vendors and vendees. The Imperial Company sold to the American Company the right to use their labels and trade-marks in the United States. And it was in consideration of that sale, and in order to carry out and make effective that sale, that the American Company wanted the covenant from the Imperial Company not to do business in the United States. For they had been able, as I have said to your Honors already, to sell, we will say, $100,000 worth of goods in this country notwithstanding the large amounts they had to pay for freights and duties and taxes, because of those labels and those trade-marks. People were willing to buy. The American Tobacco Company said: "All right; you sell us your labels; we will sell you our labels and trade-marks in Great Britain, you sell us your trade-marks and labels in the United States, and agree not to do business here."

Those trade-marks were very valuable. They must have been valuable to enable the Imperial Company to sell under them under such discouraging circumstances. They would be still more valuable to the American Company, your Honors will see; because the American Company could take these very labels and these very trade-marks and go on and manufacture goods in this country under those labels and trade-marks, and sell them at prices above those at which they sold goods under other labels and trade-marks.

It was to protect the value of those labels and trade-marks that the American Company exacted this covenant not to do business in the United States. It was the object of that Company to obtain the exclusive right to use those labels. That exclusive right was granted by the Imperial Company; and in connection therewith the covenant on the part of the Imperial Company to refrain from competition in America was an essential part of the sale of the labels and trade-marks in America.

As already pointed out, however, the primary object of the agreement (Exhibit 1) was to put an end to competition in Great Britain; and the covenant not to do business in America was merely incidental to the main object of the contract.

But it is said, "*Non Constat* but the Imperial Company might manufacture goods in the United States, and they gave

up that right." The proof is--and it is conceded, not disputed—that the Imperial Company never did manufacture in this country and never had manufactured a dollar's worth of goods, and there is no proof that they ever intended to. Therefore that could not have entered into the minds of the American Company's officers in making this agreement. As a matter of fact, as testified to in this case, it did not enter into their minds.

In this connection I want to call your Honors' attention to the use of the word "factory," which occurs in the testimony of Mr. Carlton, one of the witnesses in this case, who is the agent of the Imperial Company. He uses the word "factory" two or three times in connection with the business of the Imperial Company in this country. But he explains subsequently, and the fact is (it is not disputed) that the word "factory," as applied to the business of the Imperial Company, does not mean a place where they manufacture cigarettes or smoking tobacco or any other form of product; but it is a place where they treat leaf tobacco for exportation by stripping and stemming it. That is, the Imperial Company is engaged in the business of buying leaf tobacco in these enormous quantities and shipping it abroad; and before shipping it they stem it and strip it in order to reduce the weight. That is stated in a foot-note to the brief, in order that your Honors may not be misled by the use of the word "factory." As a matter of fact, the Imperial Company never had any manufactories in this country.

(The Court thereupon adjourned until to-morrow, Wednesday, January 11, 1911, at 12 o'clock m.)

JANUARY 11, 1911.

MR. HORNBLOWER: May it please your Honors, yesterday I was arguing that the purchase of the Ogden's, Limited, of Liverpool, by the Imperial Company, was simply and solely for the purpose of putting an end to competition in Great Britain, and had no other ulterior purpose. I had pointed out that the Imperial Company was not competing in this country to any considerable extent by the importation and sale of its

goods in this country, and that it could not so compete because of the protective tariff. I also pointed out that the Imperial Company was not manufacturing in this country and never had manufactured in this country.

Now, it is charged in the bill that the Imperial Company had resolved to commence manufacturing in this country, and the theory is suggested that it was because of this resolution to commence manufacturing in this country that the Imperial Company was arranged with by the American Company, and that these agreements resulted from that fact.

Now, with regard to this charge in the bill I submit that there is absolutely no evidence in support of it. If it were not for my high respect for my learned friends who represent the Government in this case I should be tempted to assume that they thought that a charge in a bill of complaint was a substitute for proof, and that the burden was thrown upon the defendants to deny it. Of course these charges are denied in our answer, and no proof, I submit, was offered by the Government in support of them.

The charges, for instance, against the American Company, of oppressive conduct towards their rivals in this country, in this bill, are numerous and vehement. Of course my client has no interest in this question. It has no connection in any way with the American Company except as a co-owner of stock in the British-American Company.

MR. JUSTICE LURTON: Was that British-American Company an American or an English concern.

MR. HORNBLOWER: An English company organized in England under an agreement made in England.

MR. JUSTICE LURTON: The British-American Company is not a party to this suit?

MR. HORNBLOWER: Oh, yes.

MR. JUSTICE LURTON: Who represents it?

MR. HORNBLOWER: Counsel for the American Tobacco Company. But, as counsel for the Imperial Company I will say we are interested to the extent of owning one-third of the stock; and I shall have a few words to say about that agreement before I conclude. Of course, as I say, my client has no interest in the charges made in the bill against the American Tobacco Company of unfair conduct toward their competitors in this country; but I am bound to say that after listening to

the evidence in this case, and after reading the evidence in the record from beginning to end I fail to see that there is any sufficient proof of any unfair dealing toward their competitors. Their warfare against the Imperial Company in England was open and aboveboard. It was a fierce contest while it lasted. The Imperial Company retaliated in kind. Possibly the Imperial Company may have been the aggressor for all I know; for the testimony does not disclose; but at any rate these two companies were on comparatively equal terms. The Imperial was on its own soil, and it struck back. Perhaps it struck first. There was a fierce war over there, but it was open and aboveboard. But so far as this country is concerned there is, it seems to me, and has seemed to the Court below, an utter absence of convincing proof that the American Company carried on any warfare against anybody, or adopted any unfair methods towards their competitors. I deem it but simple justice to the American Company to say this.

MR. JUSTICE LURTON: To what extent do you think Exhibit No. 2 operates to restrain the trade of the American Tobacco Company in Great Britain, first; and second, to what extent is the trade of the American Company in other countries restrained by this arrangement with the British-American Tobacco Company and the agreements contained in these two contracts to which the company that you represent is a party?

MR. HORNBLOWER: Not at all. The British-American Tobacco Company exports from this country to foreign countries all the goods that were theretofore manufactured and exported by the American Company in the United States, and all the leaf tobacco that was theretofore exported by the American Company from the United States, and all that the Imperial Company exported to countries other than Great Britain. I will come to that.

MR. JUSTICE LURTON: Is not one effect of those agreements to parcel out and to divide the trade, so far as it can be controlled, and to turn it all over to the British-American Tobacco Company in countries other than Great Britain, and to turn over to the British Company the trade in the islands of Great Britain? To what extent is the American Tobacco Company free to engage in competition in Great Britain with your Company?

MR. HORNBLOWER: It has no right to engage in competition in Great Britain. I thought I had explained that.

MR. JUSTICE LURTON: Then the question is whether or not a contract of that description is or is not in restraint of foreign commerce.

MR. HORNBLOWER: The answer to that is that the American Company was not at the time engaged in commerce with Great Britain. It had ceased to export to Great Britain. In fact the business had never amounted to very much in the way of exports, on account of the difficulty in competing in England with the Imperial Company and other British companies, on account of the differential. The testimony shows that there was practically no exportation from America to England or from England to America of manufactured tobacco; and it was because of that situation that the American Company went to England and bought the Ogden's, Limited, and started to manufacture there; and that brought on the war in England which resulted in the buying out of Ogden's by the Imperial Company in order to put an end to competition in England. The practical result of that contract was not to interfere in any way, to any appreciable extent, with the manufacturing of tobacco in this country and its exporting to Great Britain, because it was not in fact done. The Ogden's, Limited, was manufacturing in Great Britain. The American had ceased to manufacture for export to Great Britain, and in fact there was no exportation to Great Britain.

THE CHIEF JUSTICE: In your answer to Mr. Justice LURTON's question, do I understand you to say, or do I understand you to imply, not only that there was no export business being done, but that there was no potentiality of doing such business?

MR. HORNBLOWER: Yes, sir.

THE CHIEF JUSTICE: What fact do you base that on?

MR. HORNBLOWER: I base that on the testimony of Mr. Duke of the American Company, which is not contradicted. Mr. Duke testifies positively that at the time they bought the Ogden's, Limited, in England, it was impossible to export manufactured goods to England and sell them at a profit.

THE CHIEF JUSTICE: "At the time." You put in those qualifying words, saying "at the time."

MR. HORNBLOWER: Yes.

THE CHIEF JUSTICE: Was that some special condition, or was that, at the time, resulting from some permanent condition which would apply at all times?

MR. HORNBLOWER: It was permanent, so far as legislation is concerned. Of course it is possible that Great Britain might take off the differential duty.

THE CHIEF JUSTICE: Yes.

MR. HORNBLOWER: And it is possible that the United States might take off the protective tariff.

MR. JUSTICE MCKENNA: But that legislation had endured for years before?

MR. HORNBLOWER: So far as appears from the testimony, yes; and it had been increasing in severity, as I understand it, rather than diminishing. It was the tendency and the policy of the law at that time. That is the effect of the testimony. Your Honors will find Mr. Duke's testimony in Volume 4 of the record at page 451.

THE CHIEF JUSTICE: I do not want you to deflect your argument.

MR. HORNBLOWER: It is fully testified to by Mr. Duke, who was called as a witness for the defendants; and it was fully testified to by Mr. Harris; and your Honors, by the bye, will find, if you will read Mr. Harris's testimony (if you can find the time to do it), which is contained in the record, about all there is to be said on the whole subject.

MR. JUSTICE DAY: Mr. Harris?

MR. HORNBLOWER: Mr. Harris. He is the first witness, I think, that was called by the Government. He is the Vice-President of the American Company, and the Chairman of the British-American Company, and he was called by the Government and was made their own witness. He testifies very fully on this whole subject of the state of the trade as between the United States and Great Britain, and he testifies as to the reasons why you could not export from one country to the other. As a matter of fact, it did not export from one country to the other.

MR. JUSTICE LURTON: Mr. Duke's testimony has many times been referred to as establishing this and establishing that, and determining what the motive and the reason was for buying out this Company and making that trade with another.

Is the testimony uncontradicted of Mr. Duke in respect to the history of the organization of these companies?

MR. HORNBLOWER: I cannot say as to that.

MR. JUSTICE LURTON: The reason I ask is that everybody is constantly referring to Mr. Duke, and what he said.

MR. HORNBLOWER: As to the history of the American Tobacco Company, of course I have no brief for the American Tobacco Company; and as to what took place prior to 1902 I am professionally in ignorance; but I understand that Mr. Duke's testimony is uncontradicted. There was no cross-examination of him.

MR. JUSTICE LURTON: There was no cross-examination of him?

MR. HORNBLOWER: There was no cross-examination of him. I suppose the Government had reasons why they did not want to cross-examine the President of the American Tobacco Company. The reasons may have been sufficient to the Attorney-General; but at any rate there was no cross-examination of Mr. Duke. But there is a very long examination by the Government itself of the various vice-presidents of the American Tobacco Company.

Now, as I was saying, the suggestion is thrown out by the Government that there was some threat or some intention announced on the part of the Imperial Company to commence manufacturing in this country. The only attempt to support that by any evidence whatever is indirectly by a question put to Mr. Percival S. Hill, one of the vice-presidents of the American Tobacco Company. When he was called as a witness for the Government, and when he was being examined as to all the matters connected with this case, he was asked whether he had heard any rumors of the Imperial Company being about to start manufacturing in this country, in 1902. He said he did not remember any such rumors. His attention was then called to some testimony before the grand jury in a proceeding to which the Imperial Company was no party, and was then asked whether he gave such and such testimony before the grand jury, as to whether he had heard any rumors. He said he did not remember giving any such testimony and did not remember having heard any such rumors. That was

all the testimony they brought out. It may have discredited Mr. Hill, and it may not; but it certainly had nothing to do with this case, so far as the proof was concerned. No attempt was made to examine any officer of the Imperial Company as to that matter; and Mr. Duke, Mr. Ryan, Mr. Fuller and Mr. Harris, the four gentlemen who represented the American Company in this deal, who went over to England to negotiate with the Imperial Company the terms of this contract, and who actually negotiated the contract in England, testified, all of them, that they never had heard of any such intention on the part of the Imperial Company, and that it had no effect on their minds whatever; that they did not enter into these contracts with that in view at all. That is the situation—that there was no exportation to this country, except to the extent of 500 pounds a day; no manufacturing in this country by the Imperial Company; and no exportation to this country or from this country by either the Imperial Company exporting here or the American Company exporting there. That was the situation.

Now I say under these circumstances it is perfectly manifest that the main and primary object—

MR. JUSTICE MCKENNA: You mean there was no importation here except to the extent that you suggest?

MR. HORNBLOWER: Yes.

MR. JUSTICE MCKENNA: And the labels, etc., that were necessary?

MR. HORNBLOWER: Yes; and those labels were purchased by the American Company and are now being used by the American Company. They are being used. The goods formerly manufactured by the Imperial Company under these labels are now being manufactured by the American Company under the name of the Monopole Company.

MR. JUSTICE MCKENNA: And whatever you had you gave up?

MR. HORNBLOWER: Yes, sir; whatever we had we gave up; and that was part of the consideration of the covenants that we gave.

Now, there is one other feature in this contract between the Imperial and Ogden's, Limited, and the American to which I have not called attention. I have said that there was

no competition between these two companies in this country. That is true, so far as concerns the manufactured products; but it is not true so far as concerns leaf tobacco. The American Company and the Imperial Company were in competition in purchasing leaf tobacco; and when they came to make this agreement in England it was expressly provided that the Imperial Company "shall be at liberty to buy and treat tobacco leaf and other materials in the United States for the purpose of its business." So that it preserved in its integrity the absolute right to compete with the American Company in the only field in which it was competing, and it has continued to compete to this day.

MR. JUSTICE LURTON: I want to ask you a question with respect to the power that it had to compete in this country. Is there anything which would, but for these agreements, have prevented the Imperial Company from entering into competition in this country with the American Tobacco Company in the same manner that the American Tobacco Company was competing with the English Company in Great Britain, to wit, by buying out a company in its own business here as the American Company did over there? Is there anything in this agreement which would prevent this English Company from carrying the war on in this country as the American Company did carry it on in Great Britain?

MR. HORNBLOWER: The agreement does prevent the Imperial Company from undertaking to compete with the American Company in this country.

MR. JUSTICE LURTON: In other words, it cannot now do in this country what the American Tobacco Company did do in Great Britain through the Ogden's Company, Limited?

MR. HORNBLOWER: Yes, sir; I suppose that is to be conceded; and that was one of the objects of the agreement. The object of the agreement was to put an end to this ruinous competition in England, in which both parties may have been more or less at fault, and it was to prevent a similar thing happening in this country—a kind of competition that would do nobody any good, and would bring harm to other people. There is no particular reason why the English people should be allowed to come over here and compete in manufacturing with our people. There are plenty of Americans

ready to go into the business of manufacturing in this country, and who have gone into the business of manufacturing in this country, right in the teeth of the American Tobacco Company, as Mr. Nicoll so well explained yesterday.

Now, on this question of the real motive of the agreement, or the main, principal, or primary motive of the agreement and its effect on the Sherman Act, we have collated the authorities quite fully in our brief. Time does not permit me to discuss the subject except to say that it has already been recognized by this Court, both before and since the Sherman Act, that a contract for the purchase of one manufactory by a rival manufacturer together with the covenant of that manufacturer not to compete within a certain territory is valid both at common law and under the Sherman Act. That was recognized by Mr. Justice PECKHAM in the Trans-Missouri and Joint Traffic cases by numerous dicta. Mr. Justice PECKHAM in the Joint Traffic case seeks with great care and earnestness to prevent any construction being placed on the decision in that case which should make it apply to ordinary mercantile contracts by which one manufacturer buys out another. He expressly says that it has never been claimed, so far as he knows, that the Sherman Act would prevent a manufacturer from buying out a rival and taking a covenant not to compete.

The same thing was said by Mr. Justice BREWER in the Northern Securities case, in his concurring opinion, where he says that he wishes it to be understood that his concurrence is given with the understanding that he is of the opinion that this Sherman Act is not intended to affect those collateral contracts which at common law were held not to be in restraint of trade.

The dissenting opinion of Mr. Chief-Justice WHITE (then Mr. Justice WHITE), concurred in by those eminent Judges, Judges FIELD, GRAY and SHIRAS, very clearly points out the distinction between what was and what was not a valid contract in so-called restraint of trade at common law ; that really, on a proper understanding of the phrase, the phrase "restraint of trade," when used in common law, means an unreasonable restraint of trade, or such a complete restraint of trade as would come within the prohibition of the common law.

When this Court, through Mr. Justice HOLMES, came to decide the Cincinnati Packet Company case, in 200 United States, they expressly announced that very principle, and that case was held not to come within the Sherman Act, for the sole reason that it was a purchase coupled with a covenant not to compete—a purchase by a packet line of the business of a rival line, with an agreement not to compete.

MR. JUSTICE LURTON: Your contention, then, is that, in point of fact, looking to the decisions of this Court, that this Court has reached the conclusion that the first clause should read, and was intended to read: "Every contract in unreasonable restraint of trade or commerce among the several States." Whether you put in the word "unreasonable" or whether you say it shall be, substantially, a contract, you think that means the same thing?

MR. HORNBLOWER: Oh, yes; that is my view. I do not see any other view on which the cases can be supported.

In the Shawnee Compress case Mr. Justice MCKENNA takes pains to point out that that had been recognized as a valid contract—a contract for purchase—and says that if the facts in the case had shown that it was a mere case of purchase by one company of the business of another company, with a covenant not to compete, it would have been lawful; but he says that taking the whole history of that case, and all the circumstances in the record, and taking all the facts of that case as they stand in the record, he concludes that there was an attempt to monopolize, and on that ground, of there being an attempt to monopolize, and of the defendants in that case being parties to that attempt, he holds that in that particular case the Sherman law would apply if it had been brought in one of the courts of the United States, although the question whether the suit was really brought under the Sherman Act or under the law of Oklahoma seems to have been left in doubt.

MR. JUSTICE LURTON: I do not want to interrupt your line of argument, but you are going right along upon questions that are so close to your side of this case that I want to ask you if it is fair to sum up your argument to be this: That while there is contained in these agreements contracts which are to some extent in restraint of—

MR. HORNBLOWER: In restraint of competition.

MR. JUSTICE LURTON : Yes. Let me put it this way—in restraint of foreign commerce,—

MR. HORNBLOWER : Yes.

MR. JUSTICE LURTON : Between the United States and other countries—

MR. HORNBLOWER : Yes.

MR. JUSTICE LURTON : That that restraint is a reasonable restraint ?

MR. HORNBLOWER : Yes, sir.

MR. JUSTICE LURTON : And not within the fair meaning and intent of this law ?

MR. HORNBLOWER : Yes, sir. That is my view.

MR. JUSTICE HARLAN : Let me put a case. Take a case where six manufacturers in a State manufacture the same article for general use, and it is sold through all the States. These six men are in competition with each other in sales not only in the State where they are, but in the States to which they send their article. One of them has money enough to buy out the other five of them entirely, his purpose being to control the price entirely, not only in his own State but in all the other States where he sells. Is it your contention that our former decisions put that case outside of the Sherman law ?

MR. HORNBLOWER: No, sir; I would not go so far as that, because there you have established a course of dealing and have established an intent. Your Honor puts in there : " With intent to fix prices or to be able to control prices." If it appeared that this American Tobacco Company had bought the Imperial in England with a view to controlling the trade in England and had bought it with the intention of being able to fix prices in England, that would be quite another thing; but here it appears that the Imperial Company, a rival concern, a going concern, bought out the competition of the American Company in England by buying Ogden's, Limited. So far as the Imperial Company is concerned, it was a single transaction, and there is no evidence that we were parties to any scheme, if any scheme there were, to affect the trade in the United States.

MR. JUSTICE HARLAN : I did not mean to refer to the Imperial Company, but I speak generally of the construction of the law. I wanted to get at what your view of the scope and

the extent of the Sherman law was; and I put the case of a purchase by one manufacturer of all the articles of a particular kind that are shipped from State to State in competition with each other, in order that he may control the price, between the States, himself. He buys that, and becomes the sole owner. In your judgment, does that case come within the Sherman law?

MR. HORNBLOWER: I should think if the facts were proven as your Honor states them—

MR. JUSTICE HARLAN: I am assuming the facts that I state to be true—not if they were proven, but if those are the facts.

MR. HORNBLOWER: I understand.

MR. JUSTICE HARLAN: Either expressly proven, or to be reached by necessary implication. They are facts that are proven. Does the Sherman law condemn that case?

MR. HORNBLOWER: In my opinion I should be inclined to say that it did; but that is a thousand miles from this case.

MR. JUSTICE HARLAN: Well, that is a question to be argued hereafter.

MR. HORNBLOWER: That is a question to be argued, of course; but so far as concerns this particular transaction, I am now arguing for the Imperial Company, over in England, that the Imperial Company when it dealt with Ogden's, Limited, and with the American Company as the owner of Ogden's, Limited, had in mind but one single object, and the testimony overwhelmingly shows it, and the learned Assistant Attorney-General has frankly admitted it in his argument—that it was to put an end to the fierce competition in England that these negotiations started; and they went over there to England and—

MR. WICKERSHAM: I do not think he admitted that.

MR. HORNBLOWER: Perhaps he did not admit it in terms, but he admitted the facts from which that conclusion could be drawn.

THE CHIEF JUSTICE: Your reply to Mr. Justice HARLAN prompts me to ask you another question. Your criterion by which you say we are to determine or not in a given case whether a particular contract or contracts are or are not within the embrace of this law, is that it is to be determined by the intent of the parties in making it?

MR. HORNBLOWER: The intent is gathered from the circumstances.

THE CHIEF JUSTICE: The intent, you say?

MR. HORNBLOWER: Yes, sir; the primary purpose.

THE CHIEF JUSTICE: Given a state of facts in any case, if those facts are to be the criterion by which the intent is to be arrived at, may they not produce a very different opinion as to the intent upon the minds who approach that question?

MR. HORNBLOWER: That might be so.

THE CHIEF JUSTICE: One man may look at a state of facts and say, "I think the intent from this state of facts is this."

MR. HORNBLOWER: Yes.

THE CHIEF JUSTICE: And another man may approach that situation, and say "I think the intent is wholly different."

MR. HORNBLOWER: Yes.

THE CHIEF JUSTICE: Then, do you believe that the commerce of the world and the power to make these contracts is to be determined upon no certain criterion, but upon the general impression of the Court when it comes to consider the matter as to what the intent of the parties was in making the particular contract?

MR. HORNBLOWER: I am speaking of a contract of this kind, for the purchase of one plant by the owner of another plant—this particular case.

THE CHIEF JUSTICE: Then if you say the intent is the criterion, you certainly would not say that a Court, in reaching the intent, should be shut up within the four walls of that particular contract. When you go to seek the intent, the interior condition of a man's mind, you go to all the circumstances.

MR. HORNBLOWER: Certainly.

THE CHIEF JUSTICE: And facts—you go not only to that contract, but to many others.

MR. HORNBLOWER: Certainly; unless the contract by its terms shows an intent—in other words, as in the Addyston Pipe case.

THE CHIEF JUSTICE: But if it does not by its terms show the intent, then you are to arrive at that man's state of mind by looking at his whole life.

MR. HORNBLOWER: No; not that.

THE CHIEF JUSTICE: That is what intent is.

MR. HORNBLOWER: Intent is to be determined in this case, as in every other case where it is essential. Of course when you come to the question of monopolizing or attempting to monopolize trade, there you must necessarily have the intent, because it is an affirmative act.

What I was starting out to say was that notwithstanding the broad language of this Act, which says that every contract in restraint of trade is invalid, and notwithstanding the interpretation given to that Act by the courts—perhaps some of them, perhaps all of them—that the word "trade" means "competition," and that every contract in restraint of competition is void, Mr. Justice PECKHAM says that that is not the true construction of the Act, and that if it were it would put an end to all business transactions; and he says in the Trans-Missouri case at page 329, 166 U. S.:

> "A contract which is the mere accompaniment of the sale of the property, and thus entered into for the purpose"—

There comes in the purpose—

> "for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question."

And while in that case, and in the later case, the Joint Traffic Association case, Mr. Justice PECKHAM says that it is immaterial whether the contracts are reasonable or unreasonable, he proceeds to qualify that and says that certain kinds of contracts, although operating to some extent as restraining trade, are not to be considered within this statute. For instance, he enumerates the lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, and the sale of the good will of the business with an agreement not to destroy its value by engag-

ing in a similar business—which is this case—and he goes on to say:

> "We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant of manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the Act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. * * * We also repeat"—

Says Mr. Justice PECKHAM--

> "what is said in the case above cited, that 'the Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it."

Again he says:

> "To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this Court."

And later on the learned Justice goes on to further restrict that decision by taking out of its scope all contracts of any

kind between merchants and manufacturers. He gives warning to the whole world—a warning which has not always been followed—that the decision in the Joint Traffic case and in the Trans-Missouri case is not to be taken as laying down the law as between merchants and manufacturers, but as laying down the law between great railway companies whose duty it is to compete at all hazards and for all time.

He goes on to say :

> " The question really before us is—"

And the only question your Honors undertook to decide was—

> " Whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable."

That is what he meant by " reasonable." It was of no consequence to the United States whatever whether the railroads made or did not make reasonable rates. The question you were deciding was whether the railroads, being competing common carriers, bound under the statute and under the laws of the United States to perform certain duties had made a contract which impaired the obligations imposed upon them by the statute and by the common law ; and this Court said that, as between competing railroads, any attempt to regulate rates by agreement, whether reasonable or unreasonable, was unlawful under the Sherman Act.

And so the Court says, further :

> " We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to

another, that ordinary freedom of contract in the use and management of their property requires the right to combine"—and so on.

"And this is so, even though the rates provided for in the agreement may for the time be not more than are reasonable. * * * It is the combination of these large and powerful corporations"—these railroad corporations.

And that same idea is contained in the decision of this Court in the case of Gibbs vs. Consolidated Gas Company, in 130 U. S., where Mr. Chief Justice FULLER, delivering the opinion of this Court, tries to express the distinction between contracts by which public service corporations undertake to agree with each other, and contracts between merchants or manufacturers. The Court says in the Gibbs case that a corporation cannot disable itself by a contract from the performance of public duties which it has undertaken, and thereby make the public convenience subservient to its own; but that where the public welfare is not involved, and where the restraint upon one party is not greater than the protection to the other requires, the contract may be sustained.

I have already called your attention to the concurring opinion in the Northern Securities Company case, by Mr. Justice BREWER, where he says:

"Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld."

In the case of the Cincinnati Packet Company vs. Bay, 200 United States, this Court expressly held:

"Whatever differences of opinion there may have been with regard to the scope of the Act of July 2, 1890, there has been no intimation from anyone, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce would fall within the Act. On the contrary, it has been suggested repeatedly that such a contract is not

within the letter or spirit of the statute"—citing the Trans-Missouri case and the Joint Traffic case.

That is where the law stands in this Court to-day. The State courts in applying the decisions of this Court, and the United States Circuit Courts and the Circuit Courts of Appeal in applying the decisions of this Court, have recognized this rule.

The rule is stated by Judge SANBORN in an opinion concurred in by Judge VANDEVANTER (now Mr. Justice VANDEVANTER), in 125 Federal Reporter, at page 454 :

> " Acts, contracts, and combinations which promote, or only incidentally or indirectly restrict, competition in commerce among the States, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce, or violative of section 1 of the Act of July 2, 1890."
>
> " The anti-trust Act should have a reasonable construction—one which tends to advance the remedy it provides, and to abate the mischief at which it was leveled."

And the Court goes on to say, speaking of the second section :

> " Every attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the States, violates section 2 "—

but

> " Attempts to monopolize a part of commerce among the States which promote, or only incidentally or indirectly restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were not made, illegal or punishable by section 2 "

of the Act.

And the Court says, in discussing the second section—

MR. JUSTICE DAY: What case is that?

MR. HORNBLOWER: This is the case of Whitwell vs. The Continental Tobacco Company, in which the opinion was written by Judge SANBORN in the Circuit Court of Appeals for the eighth circuit, and concurred in by Judges THAYER and VAN DEVANTER. And Judge SANBORN says—of course this is a little out of the order of argument, but I may not have time to go into it fully, so I may as well say it here. It does not bear on the question of this particular contract between Ogden's, Limited, and the Imperial, made in England, but it is on the general nature and effect of the second section. The Court says:

> "But is every attempt to monopolize a part of interstate commerce made unlawful and punishable by section 2 of the Act? If so, no interstate commerce has ever been lawfully conducted since that Act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons must cease to secure for themselves any part of the commerce among the States," etc.

And then the Court goes on to say that the Act must have a reasonable construction. The same thing has been held in other cases by the United States circuit courts.

I assume that if the agreement Exhibit 1, read by itself from beginning to end, taking all parts into consideration, shows on its face that it is an agreement intended to buy off the competition of the Ogden's, Limited, in Great Britain, it is a valid transaction; and so far as concerns the covenant by the American Company not to compete in Great Britain, it is a

valid transaction under these decisions. If it be not, your Honors will have to undo what has been done heretofore, and will have to undo your decision in the case of the Cincinnati Packet Company vs. Bay.

Now, as to the British-American agreement: What was the British-American agreement? The learned counsel for the Government, with his usual ingenuity and adroitness, has made it appear that it was a mere pact between these two companies to divide up the business of the world between them; that they came together and parceled out the world; that the Imperial Company was given Great Britain, the American Company was given America, and the British-American was given the rest of the world. Now, what was the agreement? The agreement was a sale by the Imperial Company to the British-American Company of certain going concerns, plants and factories, and the good-will connected therewith. It was a sale by the American Company to the British-American Company of certain plants and factories. It was not the sale of a theoretical right to do business with foreign countries. Nothing of the sort! It was a sale of specific factories and properties. The Imperial Company had certain factories and the American Company had certain factories. They sold those factories, one to the other. Your Honors will find, in Exhibit 2, the British-American agreement. It was agreed that the Imperial Company and the Ogden Company would respectively sell to the British-American Company "their several lands, buildings and hereditaments used as export factories"—

Certain buildings were used as export factories; certain buildings were used for manufacturing for domestic commerce—

> "Their several lands, buildings and hereditaments used as export factories, and the plant and equipment and stock in trade at the date of transfer forming a part of the said export businesses or undertakings, and the American Company, the Continental Company and the Cigar Company will sell to the British-American Company factories for export business, and the plant and equipment and stock in trade at the date of transfer forming a part of the said export businesses or undertakings."

Your Honors may think that that was general language that it was merely introduced for the purpose of making a colorable agreement. Nothing of the sort! It was a *bona fide* transaction. It was agreed that the factories of the Imperial Company to be transferred should be what? Not certain undefined factories, but should include the export factory of the Imperial Company formerly belonging to W. D. & H. O. Wills, Limited, at Ashton Gate, Bristol (there is no doubt about where that was), the leasehold export factory formerly belonging to Messrs. Lambert & Butler, Limited, in London, and the two export factories formerly belonging to the Richmond Cavendish Company, Limited, at Liverpool, and the cigarette factory of the Imperial Company, formerly belonging to W. D. & H. O. Wills, Limited, at Sydney, Australia.

There are the bill of transfer and there are the factories. They are not mythical factories, but actual going concerns.

Now, how was that export business to be paid for? Each of the parties was to pay the other the inventoried value of the assets transferred. For instance, the British-American Company was to sell a certain amount of its stock for cash, and out of the cash thus provided the British-American Company was to pay for the factories and plants transferred to it by the various companies. The amount paid to the Imperial Tobacco Company, on actual inventory, detailed inventory, giving each item of machinery and materials and other assets of the concern, on actual inventory, for its various factories, plants, machinery and material, tangible assets, was 607,694 pounds 11 shillings and 11 pence, amounting to over $3,000,000.

In other words, the Imperial Company received from this British-American Company $3,000,000 in actual cash for the assets contained in the factories of the Imperial Company, which were then being used for the export business. So that instead of having this fanciful picture of these two companies dividing up the whole world as if it were a mere paper writing, and a covenant not to compete, there was something more than a paper writing. There was an actual transfer of assets; and if a decree be made in this case that transfer of assets will have to be undone if justice is to be done by the Court to these parties. If the Imperial Company is to be enjoined

from receiving dividends on the stock of the British-American Company, or if the British-American Company is to be enjoined from carrying on business in this country or with foreign countries, then there must be a decree that the Imperial Company shall receive back these factories and plants that it transferred, and that the British-American Company shall receive back the $3,000,000 that it paid. That whole thing was a business transaction, and was on a business basis, and was represented by hard cash. That was no mythical transaction, no fanciful transaction, no mere paper writing, no mere covenants not to compete, but an actual business transaction.

My learned friend, the Assistant Attorney General, without intending in any way, of course, to impugn the correctness of my quotation, criticized a quotation which appears on page 55 of my brief in regard to the trade done by the British-American Company. That is in connection with an argument by which I show that the effect of the British-American Company agreement has been not to diminish the export business from the United States but to increase it, and I, in that connection, quote from the testimony of Mr. Harris, Volume 2, page 66, the summary that I give being as follows :

> " The total exportation of American-grown tobacco in 1890 was about 1,000,000 pounds. In 1906 the British-American Company exported about 30,000,000 pounds."

The actual testimony of Mr. Harris is this :

> " Q. What was the export business of the five concerns that went to make up the American Tobacco Company in 1890 ?
>
> " A. Placed on the basis of pounds avoirdupois, the whole lot of them didn't export more than a million pounds of tobacco.
>
> " Q. From your knowledge generally of the tobacco business, what do you think the exportations were of manufacturers outside of these five in 1890 ?
>
> " A. Why, none at all."

Mr. Justice Lurton : That is limited to the cigarette business, is it not—that 1,000,000 pounds ?

MR. HORNBLOWER: He says all of the pounds of tobacco. Yes, I suppose it was cigarettes.

MR. JUSTICE LURTON: The five companies that made up the American Tobacco Company were cigarette companies, were they not?

MR. HORNBLOWER: That is true; but it goes on:

> "Q. So the exportation in 1890 of American-grown tobacco was substantially a million pounds?
>
> "A. Yes, sir.
>
> "Q. What was it in 1906, by the British-American?
>
> "A. About 30,000,000 pounds.
>
> "Q. Was that in the form of manufactured products entirely or leaf and manufactured products?"

Then he is asked further along about this thing, and he testifies as follows. On page 71 he says, in response to a question by Mr. Parker, I think:

> "In this growth of the export business in American leaf from 1,000,000 pounds to 30,000,000 pounds, has the British-American Tobacco Company and the American Tobacco Company, its predecessor, opened up new territory; I mean has it been a pioneer in the trade in opening up new territory to the American-grown leaf?"

Then he says yes, it has.

> "Q. Has this growth expanded since the formation of the British-American Tobacco Company?
>
> "A. Yes, it has.
>
> "Q. Mr. Harris, I show you a paper. Is that a paper prepared by you, showing the growth of the export business from 1890?
>
> "A. Yes, sir, I prepared that paper about a year ago.
>
> "Q. Is that a true statement of the exportations from 1899 to 1906, 1906 being estimated?
>
> "A. Yes, sir."

Then follows a schedule entitled "The American Tobacco Co.'s export business", giving the total of the manufactured

tobacco and leaf, year by year. In 1890 it gives the total as 1,138,500. So far as appears by this table there was no leaf exported. In 1902, the year before the agreement which formed the British-American Company, it is given as 16,282,838.

Then comes the British-American Tobacco Company, Limited, showing that in 1903 they exported in the shape of manufactured goods and raw leaf 20,000,000 pounds; in 1904, 22,000,000 pounds; in 1905, 27,000,000 pounds; and in 1906, 29,000,000 pounds.

Those figures—the comparison between 1,000,000 and 30,000,000—are of course approximate, and of course they were not intended to cover the entire export business from the United States in leaf tobacco, because it is conceded—it has been conceded by us—that the Imperial Company was buying more than 52,000,000 pounds itself; and it is manifest that Mr. Harris did not mean, and I did not mean, to include the whole export business in leaf tobacco; but we were comparing the business done by the American Company in exporting to foreign countries in 1890 in their products and in leaf tobacco with the business done by the British-American in 1906.

With regard to the nature of this contract—that is, the British-American contract—your Honors will see when you come to examine that contract that there is not a syllable in the contract which undertakes to regulate prices any more than there is in the Imperial-American agreement. There is not a syllable in that contract that undertakes to exclude other people from engaging in business; and I challenge the other side to show and they have not shown by the record why it was not within the possibility of any independent manufacturer in this country to export his merchandise to any foreign country that he chose. What did we do to exclude them? Is there any evidence in this record that we have done a thing, or that we could do a thing? The whole world was open to them. We could not shut out China and Japan and the islands of the sea, and claim them as the territory of the British-American Company. We could not do that. As a matter of fact, as Mr. Nicoll has shown, the business of the independents was growing constantly by leaps and bounds. These independents were not being crowded to the earth even by the American Company, much less by the British-American Com-

pany, and there was absolutely no reason that can be suggested why any independent who wanted to sell his goods in China or in Japan, if they were salable in Japan, could not have exported to those countries and sold them there, except that he did not have the facilities for selling, that he did not have the machinery for doing it, and that the machinery and those facilities were undoubtedly held by the British-American Company. There is not a syllable of evidence in this case to show that any unfair methods were adopted to prevent individuals from coming there.

Now, I have collated in my brief all the cases in this Court that have been decided with regard to contracts between merchants or manufacturers. I submit without the slightest particle of hesitation on my part that there has been no decision as yet by this Court which would invalidate any contract between manufacturers and merchants, where there was no agreement to raise prices or to exclude competition among others than the parties who signed the agreement. For instance, there are in order all of the cases which have to do with this subject. Your Honors will find them on page 57 of my brief. I exclude the Joint Traffic case, the Trans-Missouri case and the Northern Securities case, because those cases related to agreements between railroad companies holding public franchises and subject to a public duty.

We first have the Addyston Pipe case. What was that case? It involved an agreement between a number of rival and competing manufacturers, not for one to buy the other out, not to merge, or anything of the sort, but an agreement between a number of rival and competing manufacturers to the effect that there should be no competition between them in certain States or territories; and it was held that the "direct, immediate and intended effect" of the agreement was the "enhancement" of the "price."

There is not a word, there is not a syllable in this evidence to show that the price has been advanced.

In the brief of the learned counsel for the Government are inserted bodily a lot of papers taken, as they claim—and I have no doubt that that is true, of course—from the public Departments, the Department of Commerce and Labor, or some other Departments, added subsequently, many of them, to the time when this case was tried. Those exhibits were

not offered in evidence. We had no opportunity to meet them; and I submit that they ought to be disregarded by this Court, and absolutely thrown out. There was not a human being called and put upon the witness-stand to show that the price had been raised. The books of the defendants were subject to their call. The officers of the Company were called, and all through this immense record, singular to say (but it is true) no question was asked by counsel for the Government of any one of the officers of the American Company, and much less the agent of the Imperial Company, as to whether the prices of manufactured tobacco had been raised; and I submit that they cannot now, at this late day, come and put in evidence certain schedules purporting to have been taken from the Government bureaus, which we have had no opportunity to look into or to examine carefully, or as to which we have had no opportunity for cross-examination, and claim from those exhibits that there has been a raise of price. But so far as the British-American agreement is concerned, with which I am alone concerned, there is no evidence in this record that the prices of our products sold by the British-American Company have been raised as a result of this agreement. I may say, incidentally, that it would be a still further stretch of the doctrine of paternal government if we were to assume that the Sherman law meant to protect the inhabitants of China and Australia from the raising of prices by American companies, or by British-American companies. But assume that it does: There is no evidence in this record that prices have been raised, and there is nothing in the agreement that would tend to raise them.

THE CHIEF JUSTICE: I am sorry to say that your time has expired.

MR. HORNBLOWER: I merely want to say in regard to the competition in leaf tobacco that if your Honors will look at the brief you will find the question very fully discussed.

Office Supreme Court U. S.
FILED
JAN 20 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 118 (FORMERLY 316).

THE UNITED STATES OF AMERICA,
Appellant,

v.

THE AMERICAN TOBACCO COMPANY AND OTHERS.

No. 119 (FORMERLY 317).

THE AMERICAN TOBACCO COMPANY AND OTHERS,
Appellants,

v.

THE UNITED STATES OF AMERICA.

ORAL ARGUMENT

OF

DE LANCEY NICOLL (p. 1),
JOHN G. JOHNSON (p. 87),
JUNIUS PARKER (p. 105),

FOR THE AMERICAN TOBACCO COMPANY AND OTHERS; AND OF

SOL. M. STROOCK (p. 131),

FOR UNITED CIGAR STORES COMPANY,

On January 9, 10 and 11, 1911.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Oral Argument of De Lancey Nicoll, Esq., January 9, 1911.

Mr. Nicoll: If your Honors please:

Before I proceed to discuss the evidence from the viewpoint of the defendants, I will call your attention to certain paramount considerations in this Record which I believe will go far to dispel any unfavorable impressions which may have been made by the argument of the learned Assistant Attorney-General.

Paramount Considerations.

The petition in this case gives a history of the life of the defendants from the beginning, and almost their every act is brought into question. It was prepared upon the theory that the existence of the American Tobacco Company, and the other defendants, is prejudicial to the producers of tobacco, to the manufacturers of tobacco, and to the consumers of tobacco.

The case below was tried at great length. The Court listened to argument for four whole days. For two whole days the learned Assistant Attorney-General, with that eloquence and ingenuity which characterize all his addresses, endeavored to persuade the Court that many, if not all, of our acts were oppressive, coercive and generally injurious.

What was the result of that discussion? It has not appeared thus far in the argument; but the fact is that the Court below acquitted us of all the methods of which the Attorney-General now accuses us.

Judge Lacombe said:

> "The record in this case does not indicate that there has been any increase in the price

> of tobacco products to the consumer. There is an absence of persuasive evidence that by unfair competition or improper practices independent dealers have been dragooned into giving up their individual enterprises and selling out to the principal defendant. . . .
>
> "During the existence of the American Tobacco Company new enterprises have been started—some with small capital in competition with it and have thriven. The price of leaf tobacco—the raw material—except for one brief period of abnormal conditions, has steadily increased until it has nearly doubled, while at the same time 150,000 additional acres have been devoted to tobacco crops and the consumption of the leaf has greatly increased."

Judge Noyes agreed with Judge Lacombe that this Record is "remarkably free from instances of coercion and oppression"; and he added:

> "It may be that now, in applying the second section of the statute, performance, as well as power of performance, should be considered—that the elements of oppression and coercion should be shown to exist—to establish an unlawful monopoly. And if these elements are to be considered, they are not sufficiently presented upon this record. It is not shown that the defendants have reduced prices to growers, nor that they have raised prices to consumers. The instances of coercion which are shown appear rather as incidental to the development of a great business than as indicative of a policy of oppression."

Judge Ward, who wrote the dissenting opinion in the Court below, agreed with his brethren upon this subject, and said:

> "A perusal of the record satisfied me that their purposes and conduct were not illegal or oppressive, but that they strove, as every business man strives, to increase their busi-

ness and that their great success is a natural growth resulting from industry, intelligence and economy."

We come before this Court, therefore, acquitted of the very charges which the Assistant Attorney-General now repeats. We stand before your Honors with clean hands.

Another extraordinary fact about this Record which differentiates it from many cases is that these defendants have no control whatever over the supply of the raw material. They own no tobacco lands in the United States. There are unlimited lands upon which tobacco may be grown in addition to the land upon which it is grown at present. In fact, tobacco grows all over the world, and the United States does not produce much more than a third of the annual crop. This circumstance puts these defendants in a very different position from those industries which include in their assets such natural resources as coal or iron or oil or lumber or copper or other minerals.

Not only that; but the defendants have never purchased, in any one year, half of the tobacco crop of the United States. Exhibit No. 76 of the Record shows the total production of tobacco leaf and the amount used by the defendants, as compared with the total production in the years 1903, 1904 and 1905.

The Chief Justice: Mr. Nicoll, may I interrupt you just a moment? Your argument is following the line of your brief, is it not?

Mr. Nicoll: Somewhat; not here, however—not on this point.

The Chief Justice: I wanted to take some memoranda if it was not. That is why I asked.

Mr. Nicoll: Not here; but of course a great many of these facts are to be found in the brief.

The Chief Justice: Yes.

Mr. Nicoll: These facts that I am stating now will be found in the briefs, your Honor.

The Chief Justice: I beg pardon. Go on.

Mr. Nicoll: Also a discussion of some difference which has arisen between the Attorney-General and ourselves as to these facts. I am quoting them from the record, and I am quoting them from Exhibit No. 76.

This exhibit shows that in 1903 the total crop was 998,000,000 pounds. The total purchased by the defendants was 391,000,000 pounds. In 1904 the total crop was 842,000,000 pounds. The total purchased by the defendants was 329,000,000 pounds. In 1905 the total crop was 921,000,000 pounds. The total purchased by the defendants was 418,000,000 pounds. And we agreed that the crop of 1906 would show substantially the same proportions.

There is still another great fact: The defendants have never produced half of the manufactured output of tobacco. Measured in dollars and cents, the annual output of manufactured tobacco is $565,000,000. The defendants produce $212,000,000, or something less than thirty-eight per cent. of the annual crop. Of course in making this statement I am treating the tobacco business as a whole, including cigars.

There is another extraordinary fact about this record which differentiates it from many other cases: There is no charge here of rebating, or that the defendants owe their growth or prosperity to any advantage over their competitors in transportation. This fact is generally relied upon in Government prosecutions as an evidence of an intention to monopolize; and the charge is often made that many of the great industrial corporations of the United States have flourished by it, if, indeed, their prosperity has not actually been built up upon it. But however that may be in other instances, I take some satisfaction in saying to your Honors that the de-

fendants in this case have never enjoyed any such advantage over their competitors.

There is still another fact of peculiar importance. The charge in this petition is that these defendants have combined and conspired to injure the producers of tobacco. And yet the fact is that not a single producer of tobacco in the United States is here to complain. There are at least half a million men in the United States engaged in growing tobacco, and yet there is not one of them who is a complainant before this Court.

Another charge is that these defendants have combined and conspired to injure the manufacturers of tobacco. But not a single independent manufacturer was called by the Government to sustain that charge. The only independent manufacturers in this case who were called were called by the defendants. They were called by us to prove the fairness and justice of our methods. We called the largest independent manufacturer of plug tobacco, the largest independent manufacturer of scrap tobacco, the largest independent cigarette manufacturer; and all of them agreed that the methods of the defendants had been fair and just, and the avenues of distribution kept free and open.

The charge is also made in the petition that these defendants have combined and conspired to injure the consumers of tobacco in the United States. Yet out of the millions and millions of men who use tobacco products in the United States, no one came to complain.

But that is not all. The Assistant Attorney-General has told you of the frequent purchases made of plants and brands from competitors. And he made to-day the very general charge that these vendors had been coerced to sell. The charge in the petition is this:

"The defendants have driven out opponents, deterred others from entering, and now unreasonably

hinder, restrain and monopolize interstate and foreign trade and commerce in leaf tobacco and articles fabricated therefrom or necessary therein. They have already driven out most opponents, and have attained such power in combination that the few established competitors must conduct their business in the well-grounded fear of swift destruction."

What proof was there to sustain this charge? This proceeding certainly offered an opportunity to all men in the United States who had been coerced or dragooned to come forward and tell the story of their wrongs. If, indeed, these defendants had coerced others to sell, here was the opportunity at last to tell the tale. Yet but one witness (Mr. Puryear, of the Nashville Tobacco Works) made any such complaint. I will explain that transaction as I proceed. And no manufacturer was called to prove that he conducted his business in fear of swift destruction, or in any fear at all on the account of the defendants.

There is still another paramount fact about this Record. Notwithstanding the claim that these defendants have restrained trade in tobacco leaf and in the products manufactured therefrom, from their organization in 1890 down to the year 1907, it appears that in that period there has been a great increase in the number of tobacco factories and in the number of cigar and cigarette factories. In 1890 the number of tobacco manufactories in the United States (by which I mean smoking and plug tobacco) was 1,021. In 1907 it was 3,600. In other words, during the period of the birth and growth of the American Tobacco Company, the tobacco plants in the United States more than trebled. During the same period the cigar and cigarette manufacturers have increased from 23,000 to 26,000. I am speaking now of the growth of the independents, not the

growth of any factories controlled by the American Tobacco Company. And in this connection I ought to call your Honors' attention to another fact which appears in the Record; and that is that in certain branches of the tobacco business our percentage has constantly decreased instead of increasing. If the theory of the Government is true that we possess such enormous power over the trade, why should not our percentage have increased from year to year?

Yet what are the facts? We started, it is true, in 1890 in the cigarette business with ninety-seven per cent. The very next year it fell to eighty-nine per cent. It has been constantly falling ever since, until in the year 1907 it reached seventy-three per cent., or twenty-four per cent. less than when we started.

Mr. Justice Hughes: What was the difference in the total consumption of cigarettes during that time?

Mr. Nicoll: Say about a billion more a year, Mr. Parker tells me. Now, as to cigars: We started the cigar business in 1902 with a percentage of sixteen per cent. That fell by 1907 to fourteen per cent.

I have brought forward these various considerations in advance of a more detailed discussion of the evidence, in order to show your Honors that after all the Record in this case has not the dark and somber colors in which the learned Assistant Attorney-General has endeavored to paint it.

I will now proceed with an account of the birth and growth of the American Tobacco Company. Here our contention with the Government begins.

Government Charges.

The Government charges that the main purpose and intention of the defendants from the beginning was to restrain trade by suppressing competition;

and that that is shown by the circumstances of our several consolidations and incorporations, by our frequent acquisitions, by the covenants taken from venders to refrain from trade, by our methods of leaf-buying, by our stock-holding in other companies, and by our methods of competition.

We reply that the story of the birth and growth of the American Tobacco Company is the story of the natural, orderly, legal and logical evolution of what has gradually become a great business; that our constant purpose was to foster and increase our trade; that we had no other purpose or intention; and that if by our acquisitions competition was lessened, that was incidental to the main and paramount object which we always had in view.

American Tobacco Company.

The date with which we start is the latter part of the year 1889, or the beginning of the year 1890. At that time there were five concerns engaged in the manufacture of cigarettes from Virginia tobacco—W. Duke Sons & Company, at Durham, North Carolina, a corporation; Allen & Ginter, at Richmond, a corporation; the Kinney Tobacco Company at New York, a corporation; Goodwin & Company, in Brooklyn, a partnership; and W. S. Kimball & Company, in Rochester, a partnership. The business of making Virginia cigarettes was at that time a comparatively new industry. It had been going on for only a few years; and the individuals controlling these three corporations and two partnerships agreed to form a corporation under the laws of the State of New York, and to convey to it their respective properties by actual deeds, taking in exchange the shares of the New Jersey corporation in agreed proportions.

There was no purpose in this consolidation to increase the price of tobacco products to the con-

sumer; and no increase in price was made. There was no purpose to diminish the price of tobacco leaf to the farmer. That increased on account of the expansion of the business. The sole purpose was to increase the business by having a more complete organization for managing it and to effect economies in conducting it; because the expenses of advertising had increased to an enormous extent, amounting in the case of W. Duke & Sons to as much as $800,000 a year, or nearly twenty per cent. of the whole business. The advertising expenses of the others were equally large. These concerns were wound up, and their plants and businesses taken over by the American Tobacco Company; and the business was carried on by the new organization in the same factories, except where it was found more economical or convenient to manufacture at some other point. Then the factories were sold, but the manufacture of the brand was continued. The New Jersey corporation received the actual properties, with their live assets and good will, and paid for them in its stock.

The Assistant Attorney-General in the course of his remarks commented upon the fact that, according to an estimate made by the Bureau of Corporations of the Department of Commerce and Labor in the year 1908, two years after the trial of this case was over (see Reply Brief, p. 10), the value of the tangible assets of the factories and the plants and the stock on hand and bills receivable that went over to the New Jersey corporation was only $3,500,000. And he makes the charge that here was an instance of gross overcapitalization. But, of course, he ignores in that statement what is the only thing of real value in the tobacco business, and that is the brands. The brand of "Bull Durham," of which your Honors will hear as I proceed, was one sold at auction for $4,000,000—one brand of tobacco alone.

The Government discovers in this organization of the American Tobacco Company in 1890 the germ of an intention on our part to restrain trade. This, it is said, was the beginning. But we reply that it was nothing but a consolidation of concerns by men who believed that their business could be more effectively managed by a corporation. It was really nothing more than a new partnership. If you say that there was a termination of the competition which had previously existed between these various concerns, the result would have been the same in case a partnership had been formed. What if the gentlemen composing these two partnerships and three corporations had formed a new partnership, we will say of fifteen members, believing that such an organization would be more effective in the management of their business? Could that be condemned because of the incidental suppression of competition? The result would have been just the same.

The Attorney-General upon the last hearing of this case said that this transaction showed that the American Tobacco Company was "conceived in sin and born in iniquity." But I ask him, Was there anything illegal or immoral about it? No State law forbade it, and the laws of many States encouraged it. As a matter of fact, as we all know, it was a typical case which went on all over the United States, and which has been going on ever since, until to-day a very large part of our industrial structure is built up on these lines.

The American Tobacco Company was a cigarette company; it had only a small smoking business. It soon became apparent to the experienced men who had charge of the company that it was necessary to acquire properties in other branches of the trade; for they had constantly in mind one of the peculiarities of the tobacco business—that the popular taste constantly changes, and that what is profit-

able and successful to-day may not be profitable and successful to-morrow. They had issued securities of $25,000,000—$10,000,000 of preferred and $15,000,000 of common stock; and in order to broaden the basis upon which the securities were issued, and to give permanent value to them, they proceeded to purchase some plants in other lines of business. The Government here sees our next offense after our iniquitous organization. Yet it seems to me to have been the most eminently conservative and reasonable thing that they could have done. Indeed, it was more than conservative; it was necessary if the American Tobacco Company was to continue in business; for just what they expected to happen did happen. Popular taste did change, and in a very short time the business of making Virginia cigarettes became comparatively insignificant compared with its size when the American Tobacco Company was organized.

Let us see what they did. They bought a plug concern, the National Tobacco Works, at Louisville; the smoking business of Marburg in Baltimore; the smoking and snuff business of Gail & Ax, in Baltimore; Whitlock's business in cheroots; from Hernsheim, of New Orleans, a machine for making cigarettes without paste; and on account of the prejudice which had arisen against paper cigarettes, they bought three concerns in Baltimore which were making all-tobacco cigarettes, viz.: Herman Ellis, Hall, and the Consolidated Cigarette Company.

Mr. Justice Holmes: Is that what is meant by "Little Cigars?"

Mr. Nicoll: Yes, that is what is meant by "Little Cigars."

None of these concerns was in competition with the American Tobacco Company at all. They were in different lines of business. Each was bought for cash, although in two instances they gave cash and

a little stock; and they took from the vendors deeds of the property which they bought. If it was a corporation, they did not buy the stock and issue their stock in exchange; they bought the actual property and paid for it in cash, having no other purpose in view than the purpose which I have just stated—of broadening the basis upon which the business was organized, and of giving permanence and value to their securities.

Continental Tobacco Company.

What was the next step? We have not reached the year 1895, or six years after the organization of the American Tobacco Company. By that time it had become quite a prosperous concern. It had its cigarette business, with which it started; it had its old smoking business and a little more; it had some plug business; it had the business of little cigars which it had acquired from the Baltimore houses; and it was going on making money when its success attracted the attention of the powerful plug manufacturers of the United States. They at once commenced to make war upon it. The Drummond Company in St. Louis proceeded to sell at a reduced price one of its brands in the City of Philadelphia in competition with a brand of the American Tobacco Company. Naturally the American Tobacco Company retaliated; and that brought on what is known in this Record as the "Plug" or "Battle-ax War."

My learned friend on the other side would have you believe that this was begun by the American Tobacco Company for the purpose of bringing into submission the great plug manufacturers. But that is not the fact. If there is one thing that is clearly shown by this Record, it is that that war was forced upon us. It was not of our seeking. Of course, we were anxious to end it. He quotes a resolution of

our Board of Directors instructing the officers of the Company to endeavor to end it. Undoubtedly we were anxious to end it, for the losses were piling up. No business transaction of that sort can be conducted without loss. And so we made an attempt to end it; but that failed, and the war went on from the year 1895 to the year 1898, when two gentlemen named Ray and Hughes, who were promoters, having obtained options upon some of these plug concerns in the Middle West, came to us and offered to sell them to us. We declined to buy. That put the matter over for some time, when these same gentlemen, Ray and Hughes, undertook to organize a plug concern, and came to us and asked us to sell our plug business to their concern. We agreed to do it—to take $20,000,000 of stock out of a total capitalization of $75,000,000; in other words, to sell our business for less than a third of the total capital stock. That plan failed. Nothing was done. In the meanwhile we bought the Drummond Company from the heirs of its founder; we bought the Brown Company, another one of these plug concerns, because of the unusual success and popularity of its brand; and then when Ray and Hughes renewed their proposals we actually did sell our plug business to the Continental Tobacco Company for a little over a third, but less than a half, of its capital stock.

We are accused by the Government of having made repeated purchases; and yet the first great transaction that we come across in this history is a sale, and not a purchase, of some of our business.

We sold our plug business to a company in which we had a minority interest; and we never did have control or anything more than a minority interest in the stock of the Continental Tobacco Company.

Mr. Justice Lurton: Did you sell for cash or for stock?

Mr. Nicoll: We sold for stock.

Mr. Justice Lurton: For what proportion of the whole stock?

Mr. Nicoll: I say, we received $30,000,000 out of $75,000,000.

Mr. Justice Van Devanter: Did those proportions continue?

Mr. Nicoll: No; the capital of the Continental Tobacco Company was afterwards increased to $100,000,000, but we still held $30,000,000 or $37,000,000. I will come along presently to the account of the merger.

A great deal is made out of the fact that Mr. Duke became the President of the Continental Tobacco Company. But that was not in the contemplation of the parties when the company was organized; and he became president only on account of the disputes which arose between the other candidates.

Here, then, was the Continental Tobacco Company doing a plug business, and the American Tobacco Company doing a smoking and a cigarette business; and they were not competing concerns. There is no competition between plug on the one hand and cigarettes and smoking tobacco on the other. They are made from different kinds of tobacco, by different processes, sold in a different way, and have an entirely different class of consumers. But naturally the securities of the two companies drifted into the same hands. Men who had stock in the American Tobacco Company were naturally attracted toward the shares of the Continental Tobacco Company; so that in a few years a large amount of these stocks were found in the same hands.

That brings us to the year 1899.

In 1899 the American Tobacco Company purchased the Union Tobacco Company, which was a

new concern organized by a group of financiers who had acquired a considerable business in smoking tobacco and cigarettes; one motive being, as stated by Mr. Duke, to bring about an association with powerful financial interests who might prove of aid in the further development of the business.

Consolidated Tobacco Company.

In 1901 the American Tobacco Company decided to extend its lines by going into the cigar business. That required additional capital. At the same time difficulties had arisen about the development of the trade in foreign countries, particularly in England; and more capital was necessary for that purpose. Various plans of raising money were proposed—either by issuing bonds or by increasing the stock—but none of them was found to be practicable. So there was formed in 1901 the Consolidated Tobacco Company, with a cash capital of $30,000,000 (afterwards increased to $40,000,000 in cash); and the Consolidated Tobacco Company then made an offer to the common stockholders of the American Tobacco Company and the Continental Tobacco Company. They offered to buy their shares with the four per cent. bonds of the Consolidated Tobacco Company. They offered the stockholders of the American Tobacco Company two for one—that is, $200 in bonds for $100 in stock. To the shareholders of the Continental Tobacco Company they offered $100 in bonds for $100 in stock. So that the shareholder of the American Tobacco Company who had been getting six per cent., if he accepted this offer, got eight per cent.; and the shareholder in the Continental Tobacco Company, who had never received a dividend, got four per cent.

It is not surprising that a very large number of the stockholders of the Continental and the American Tobacco Companies accepted this offer; while

the men who put up the $40,000,000 pledged their money as security for the payment of the bonds and the interest upon them.

Merger in 1904.

So we have the Consolidated Tobacco Company formed in 1901. That was not a company conducting a manufacturing business. It held the common stocks of the American Tobacco Company and the Continental Tobacco Company. But, as I have just pointed out, they were not competing concerns. One was doing a plug business, and the other a smoking and cigarette business. That went on until 1904, when it was determined to form a new corporation on account of the confusion which existed about the securities upon the exchange, and in order to effect some additional economies in the business. At this time this was the condition of the securities:

The American Tobacco Company had out its preferred stock and a small remnant of its common stock. The Continental Tobacco Company had out its preferred stock and a small remnant of its common stock. The Consolidated Tobacco Company had out $150,000,000 of these four per cent. bonds which it had issued for the purpose of purchasing these common stocks. The Consolidated Tobacco Company had also its common stock. And in order to be rid of that confusion about the securities, it was agreed to merge these three companies—the Consolidated, the Continental, and the American—into a new company, called the American Tobacco Company, under the laws of the State of New Jersey.

An equitable distribution of the securities was arranged. The preferred stockholders of the American and of the Continental Companies got the first lien upon the property, viz.: The bonds. The bondholders of the Consolidated Company had their choice: They were either to receive bonds in

the new company, or, at their election, some preferred stock; while the common stockholders of the Consolidated Company received the common stock of the American Tobacco Company. Of course a transaction of that sort could not be executed without some differences of opinion. Litigation arose in the State of New Jersey; and the whole matter was considered and thrashed out in its courts, and finally decided in favor of the legality of the merger.

Such, in brief, is the history of the American Tobacco Company from 1890 to 1904.

Mr. Justice Lurton: Was there an opinion in the merger case that you speak of?

Mr. Nicoll: Yes, your Honor. It is referred to, I think, in the brief.[1]

The American Tobacco Company.

The American Tobacco Company, formed in this way, is not a holding company. It has factories for the manufacture of its products in New York, in Baltimore, in Richmond, in Durham, in Danville, Louisville, in St. Louis, in Cincinnati, in Chicago, in Middletown (Ohio), and in other places. It manufactures in its own factories the greater part of its output. Out of a total output of all concerns in which it had an interest of 3,900,000,000 cigarettes in 1906, it manufactured 3,200,000,000. It manufactured in its own factories 942,000,000 little cigars, as against 12,000,000 manufactured in the factories in which it held stock. It manufactured 98,000,000 pounds of plug tobacco in its factories, as against 68,000,000 pounds manufactured in the factories in which it held stock. And the only branch of the tobacco business in which the com-

[1]Ikelheimer *v.* Consolidated Tobacco Co., 59 Atl. Rep., 363; not in N. J. Court Reports. Complainants never took the case to the Court of Errors and Appeals, so a few days later an order was entered dismissing it.

panies in which it holds stock manufacture more than is manufactured in the factories of the American Tobacco Company is in the case of the smoking tobacco, for reasons which will appear as I proceed.

The American Tobacco Company has become a corporation whose shares are widely distributed. My learned adversary talks about this business being in the control of six or eight men. Of course this corporation is not unlike many corporations where quite a small number of men own a large proportion of the stock. But as the tobacco company has grown, the stock has been widely distributed.

We are not dealing here with any question of six or eight men. We are dealing with thousands and thousands and thousands of innocent holders of these securities, who have followed the modern habit of investing their savings, not in lands as formerly, but in the securities of well-established companies, in whose management they feel confidence, and whose prosperity they feel to be assured.

At the end of the year 1907 there were 109 holders of preferred stock holding at least 1,000 shares, and 4,745 holders of preferred stock holding less than 1,000 shares; 48 holders of common stock holding at least 1,000 shares, and 584 holders of common stock holding less than 1,000 shares. The bonds, which amount to $50,000,000 of one issue and $60,000,000 of another, or $110,000,000 in all, are very widely distributed, and are held by institutions and individuals in all parts of the United States.

American Snuff Company.

We come now to the American Snuff Company. One would think from listening to the argument of the learned Assistant Attorney-General that the persons in control of the American Tobacco Company had deliberately set out to buy all the snuff con-

cerns in the United States. But no such thing as that is shown by this Record. The Snuff Company is another instance of a sale by the American Tobacco Company, and not a purchase. It came about in this way:

I have already told your Honors that in 1891 we bought in Baltimore a smoking and snuff business conducted by Gail & Ax. We did not buy the snuff business because we wanted the snuff business, but because we wanted the smoking tobacco business. But, as very often happens in these factories, the smoking tobacco business had associated with it a little snuff business. And in that way we came into possession of a small amount of snuff business.

Again, at its organization in 1898 the Continental Tobacco Company had acquired the Lorillard business, which had quite a large snuff business. But neither the American Tobacco Company nor the Continental Tobacco Company had any snuff organization. The snuff business is an entirely different business from the tobacco business —that is, the smoking business or the plug business. Snuff is made out of different materials. It is manufactured by different processes. It is sold on different selling plans, and it goes to an entirely different class of consumers. In order to conduct it properly, it requires a separate organization; and we had none.

That was the situation in the year 1900. About a year and a half or two years before that, certain snuff manufacturers entirely independent of us had organized the Atlantic Snuff Company. They had acquired the business of several large snuff concerns, but they did not acquire the business of the American Tobacco Company nor of the Lorillard Company. They went on with their snuff business for a while until 1900. Then, only in order that we might have some effective organization for the management of our snuff business, we co-operated

with them to form the American Snuff Company. They turned over the business of the Atlantic Snuff Company, and we turned over to the American Snuff Company our business. They received $7,500,000 worth of the preferred stock and $2,500,000 of the common stock. We received $2,500,000 of the common stock and $7,500,000 of the preferred stock. At the same time the American Snuff Company purchased the business of Mr. Helme of Philadelphia, for $2,000,000 of preferred stock and $1,000,000 of the common stock.

By this transaction the American Tobacco Company acquired no control of the Snuff Company; for the preferred and common shares had an equal voting power. It has never had any control of the Snuff Company. It has never had anything more than an investment in the Snuff Company of about forty per cent. The first President of the Snuff Company was Mr. Helme, of Philadelphia. He was succeeded by Mr. Condon. Neither of them was or had ever been in any way connected with the American Tobacco Company. It has its own buying organization, its own selling organization; and the relation of the American Tobacco Company to it is nothing more than that of a holder of its securities in consideration of a sale of its property.

A great deal is said about the large percentage which the Snuff Company has acquired of the snuff trade. How has such a percentage grown up? It appears that this percentage has come about, not by acquiring the business of competitors, but on account of the business which the American Snuff Company itself has developed. When it was formed it did a business of 9,000,000 pounds out of 13,000,000 pounds. It is true it bought some businesses. It bought De Voe's business; it bought the Standard Snuff Company's business; it bought Weyman's business. But most of those purchases were insignificant. By those purchases it acquired

an additional business of only 2,000,000 pounds. But it has now achieved a business of 22,000,000 pounds. So that if you add the 2,000,000 pounds which it acquired to the 9,000,000 which it had when it was organized, we find that by the unusual activity and intelligence of its management it has doubled its own business.

American Cigar Company.

The Assistant Attorney-General makes a great criticism upon our going into the cigar business. He said that having acquired the snuff business we had branched out to get control of the cigar business. Well, if we did we have certainly been very unsuccessful; because, as I have said, we never had more than sixteen per cent. of the cigar business, and that has decreased to fourteen per cent. But why should we not have gone into the cigar business? If we had succeeded in other branches of trade, why should not some of our surplus be expended in expanding our trade in the direction of the cigar business? The cigar business is an immense one. There are seven thousand millions of cigars produced annually in the United States, the value of the output being $350,000,000; and all that we have ever done of it is $50,000,000.

We went into the cigar business in order to expand our trade. Having no organization for the manufacture of cigars, and having a cheroot business of our own which we had acquired in 1891, the American and the Continental companies in 1901 co-operated with Powell, Smith & Company (a large cigar manufacturing concern) to form The American Cigar Company with a capital of $10,000,000. Afterwards it acquired some manufacturers in Florida——

Mr. Justice Lurton: What was that year, Mr. Nicoll? I did not catch it.

Mr. Nicoll: The year? 1901.

Afterwards it acquired some manufactories which manufactured cigars of a different grade in Florida. Then it acquired some factories in Cuba and Porto Rico. But it has never done half of the business that is done in Cuba either in cigars or in cigarettes; and not over twenty-five per cent. of the Cuban cigars which it manufactures come to the United States.

American Stogie Company.

It was found from experience that the cigar business required some subdivision in order to be efficiently managed. Therefore we formed in 1903 the Stogie Company, which is a concern organized to manufacture the cheapest kinds of rolls of tobacco, called stogies and tobies, a kind of cigar that is sold for about one cent apiece. We have never had more than fourteen or fifteen per cent. of the stogie business.

The stogie business was organized for the same purpose as the cigar company—in order that we might have a more effective organization for this part of our manufactured product. All of these companies—the American Snuff Company, the American Cigar Company, and the American Stogie Company—have separate leaf-buying establishments. They buy in competition so far as they are of similar grades, and have different selling organizations and different selling plans.

English Contracts and Companies.

That brings me to the foreign business. It was a very natural thing, I suppose, that the American Tobacco Company should endeavor to extend its trade to foreign countries. At least, we have always looked upon it as a proper, and, indeed, a patriotic performance, until now. We extended our trade abroad as best we could, and among other places to Great Britain. The tariff laws of Great

Britain differentiated against us, so that it became impossible for us to sell any manufactured American tobacco in Great Britain without buying a factory there. Therefore we bought Ogdens, Limited, and paid for it $5,500,000 in cash. The English people, alarmed by the American invasion, organized the Imperial Tobacco Company by uniting a large number of the tobacco manufacturing plants in Great Britain. A trade war, begun by the Imperial Company, followed, which existed for some time at a considerable loss. Finally, the conflict was ended in this way:

We sold Ogdens, Limited, to the Imperial Tobacco Company, for stock of the Imperial Tobacco Company, most of which we have since sold. At the time when this case was heard we had left only five per cent. of the Imperial Tobacco Company's stock.

Much is said about the fact that we bought Ogdens, Limited, for $5,500,000 and sold it for $13,000,000. But my learned friend evidently forgets the millions of dollars that we spent on Ogdens from the time of our purchase until the time of the settlement. At all events, we made the best trade we could with the Englishmen.

The Imperial Tobacco Company, in turn, sold us their business in the United States. Of course, it did not amount to as much as our business in Great Britain, because our tariff was so high that no English manufacturer could do much business in this country. But still, they had some. We sold our business, and they sold their business. When we sold the actual properties, we sold what was of much more value than the actual properties: We sold to the Englishmen and the Imperial Company the right to use our brands in England, and they sold to us the right to use their brands in the United States. It was a transfer of great and valuable properties. And as an incident to the sale, in either case a covenant was entered into not to com-

pete with or use in competition the properties so sold.

I ask my learned friend, Of what value would have been our brands to the Imperial Company if we had left ourselves at liberty, without a covenant, to proceed and manufacture in Great Britain notwithstanding the sale of the brands? Of what value would their brands have been to us unless we had taken from them a covenant not to compete with us in the United States and not to use in the United States the brands we sold them?

That is all there is to the English transaction, except the export business. Both of these companies had an export business—that is, a business foreign to the United States and foreign to England. Both sold that business, with the brands, to the British-American Company. The American Tobacco Company conveyed its export business and its factories to the British-American Tobacco Company, and took cash for the transfer. The Imperial Tobacco Company did the same. And the British-American Company has from that time on conducted the export business which formerly belonged to these two concerns, with enormous additions made by its own activities, and has been in no sense a holding Company.

It has been one of the most valuable things ever done for growers of tobacco in the United States. Since its organization seven years ago the British-American Company has increased the use of American leaf in manufacturing here for export purposes from twenty million pounds a year to over thirty million pounds a year.

Supply Companies.

Now as to our supply companies: On this subject the learned Assistant Attorney-General indulged in such generalizations as would induce your Honors to believe that we had extended our

activities to other branches of business besides the tobacco business. Such is not the fact. All there is to that matter is this: For the efficient and economical management of a great business it is necessary that there should be reliable sources of supply of those materials which are used in the manufacture of tobacco, such as tin-foil, boxes, bags, licorice, sugar and what not. No great manufacturing company can afford to depend upon chance for its supply of such materials. It must have them always on hand or must cease manufacturing. Take tin-foil, for instance: A constant supply of that is necessary for our business. Therefore, we bought an interest in the business of Mr. John Conley, leaving him in the management, and owning a third of the business. Then we acquired the Johnson Tin-foil Company, so that in case one factory was destroyed we should have another. The Conley Company sells the greater part of its tin-foil to us, but it sells to all the other manufacturers at the same price. The other manufacturers may buy their goods of the Conley Company; or, if they do not, and they so choose, they can buy of Lehmaier, Schwartz and Company, which is a combination of independent manufacturers representing the owners of at least four different plants. We also acquired an interest in a concern for the manufacture of bags and small containers, of which we use a great quantity.

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Mr. Nicoll: If your Honors please, when the Court took an adjournment yesterday I was speaking of the supply companies, and had discussed the case of the Conley Tin Foil Company, in which the American Tobacco Company had an interest. We also acquired an interest in a concern for the manufacture of bags and small containers, of which we use a great quantity.

These are the little packages in which smoking tobacco is packed. That concern—the Golden Belt Manufacturing Company—sells to us the greater part of its product, but it also sells to independent manufacturers at the same price. The same is true of the Mengel Box Company—the Company which makes the boxes in which the tobacco comes; and the same is true of the Licorice Company, and all of these articles, the cotton containers, boxes and licorice are sold by us to independent manufacturers, who can also if they choose, procure the same articles through others.

McAndrews & Forbes—The Licorice Company.

So much was said about the Licorice Company—the McAndrews & Forbes Company—and so much was sought to be made of the fact that some years ago the Government undertook a prosecution of the Licorice Company and its officers that I desire to say a few words upon that subject.

During the first five months of the year 1906 the grand jury of the Circuit Court of the United States for the Southern District of New York made an exhaustive examination of the American Tobacco Company and its subsidiary companies. All of their transactions were minutely investigated, but the only one which was made the subject of a charge was the one which I am about to discuss.

Licorice paste is a necessary ingredient in the manufacture of plug tobacco. When the Continental Tobacco Company in the year 1899 acquired the Liggett & Meyers Company, in St. Louis, they found that the Liggett & Meyers Company were manufacturing their own licorice paste a greater cost than the price of the licorice paste to the Continental Tobacco Company. This convinced the president of the Continental Tobacco Company that the profit to manufacturers of licorice was inadequate and of the necessity of securing a per-

manent supply of licorice paste at a reasonable price. The Continental Tobacco Company thereupon bought in Philadelphia a concern called Meller & Rittenhouse, and enlarged its factory, keeping the matter secret from rival manufaturers of licorice paste for fear they would refuse to sell it. That brought about a consolidation between Meller & Rittenhouse and the McAndrews & Forbes Company, which was the oldest concern engaged in the manufacture of licorice paste in the United States. It had been in business for many years, and made the most popular paste in the market. The officials of the American and Continental Companies made up their minds that if they could unite that concern with their own, they would then have what they deemed necessary for their business—a permanent supply of licorice paste at a reasonable price.

Soon after this the president of the Continental Company became convinced of the necessity of having always on hand a two-years' supply of licorice root—not licorice paste, but the root from which the paste is made. This licorice root grows in Russia, in Syria and in other parts of Asia, and the gathering of it is attended with great difficulty. It grows wild, and its collection is interrupted by the disturbances which are constantly occurring in those countries. These became aggravated at the time of the Japanese-Russian War, and the fear was entertained that a two years' supply of licorice root could not be secured except at a prohibitive price. It was therefore decided to acquire an interest in the Young Company, a concern manufacturing licorice paste at Baltimore, and to enter into a trade contract with Lewis, another concern manufacturing licorice paste at Providence, in Rhode Island. The object in making these contracts was not to control the supply of licorice paste, but to prevent Young and Lewis from interfering with

the plan of procuring in Asia the two-years' supply of licorice root which was deemed necessary for the protection of the business. These transactions were expressed in contracts, and were abandoned several years before this suit was brought, and before the indictment. The Government seized upon these abandoned transactions and obtained an indictment against the McAndrews & Forbes Company, the Young Company, and included in the indictment Mr. Jungbluth, the President of the McAndrews & Forbes Company, and Mr. Young, the President of the Young Company. They were all indicted for a violation of the Sherman law. Upon that trial we showed the jury just what we have showed the Circuit Court here—all our business transactions and methods, so far as they related to licorice paste; and while the jury, under the instruction of the Court, found the companies guilty, because of the terms of the written contracts long abandoned, they acquitted the individuals who had actually made the contracts, because they were able to see what everyone connected with the case, except the Government, was able to see, that there was no intention on our part to harass or oppress our competitors, and that the violation of law, if it existed at all, was purely a technical one.

Now, from that time on the situation with regard to licorice paste has been this:

There are other manufacturers of licorice paste besides the McAndrews & Forbes Company. One is Lewis, of whom I have just told you, now altogether indepedenent of us. Another is Weaver & Sterry, of New York. Another is the Pharmaceutical Works, in Jersey City. But the McAndrews & Forbes Company is the largest, and it sells the greater part of its products to the American Tobacco Company for the manufacture of its plug tobacco. It also sells to such independent manufacturers as desire it. There is nothing in the world to

prevent any independent manufacturer from making licorice paste himself, and some of them have done it—notably Mr. Larus of Richmond—but the McAndrews & Forbes Company has such an established reputation, and its conduct is so fair, that the independents prefer to use it rather than to go into the business on their own account. Therefore we sell it to them at exactly the same price as it is sold to the American Tobacco Company. In other words, we offer the independents a ten-year contract at eight cents a pound—the same contract as is made with the American Tobacco Company. If they do not want to enter into a ten-year contract, but want a contract from year to year, we sell it to them for one cent a pound more—nine cents a pound. So that the situation of the independent maunfacturers with regard to licorice paste is this:

They can have a ten-year contract at the same price as the American Tobacco Company; or they can have a contract from year to year at nine cents a pound; or they can buy of the independent manufacturers of licorice paste whom I have just mentioned; or, if they choose, they can go into the manufacture of licorice paste themselves. It seems to us that this conduct is so eminently fair that no just criticism can be made of it. Certainly no one can spell out of it any attempt on our part to restrain trade in licorice paste.

Nature of Transactions Shown by Record.

I have now gone over briefly the history of the birth and growth of the American Tobacco Company.

What are the transactions shown? The only ones that are impugned by the Government fall within the four following classes:

(1) Consolidation of competing manufacturing interests through the formation of a corporation,

and the transfer to it of the respective properties of the competitors in exchange for stock of the vendee corporation, or for cash;

(2) The purchase by a corporation of the property of a competitor directly, or the purchase by such corporation of the whole or part of the capital stock of such competitor, generally for cash, but in one or two instances in exchange for the shares of the capital stock of the purchasing corporation;

(3) The purchase by a tobacco manufacturing company for cash of all or a part of the capital stock of a corporation engaged in the manufacture of materials used by the vendee company, such as wooden boxes, cloth bags, licorice paste, &c.

(4) The purchase by a tobacco manufacturing company for cash of all or a part of the capital stock of a mercantile corporation engaged in selling at wholesale or retail manufactured tobacco, or the products of tobacco.

Now, the judgment below did not condemn the two last transactions—which we may call the two minor transactions—but it did condemn the two major transactions, on the sole ground that competition in either case had been suppressed, and that any suppression of competition, no matter how brought about, and even by the purchase of a competitor, was a violation of the Sherman Act.

Different Products of Tobacco Not Competitive.

Your Honors must not assume from the general statement of the character of the transactions shown that each consolidation and each purchase in this Record was a consolidation or purchase of competitors. The peculiarities of the tobacco business really put it in a class by itself. There are so many varieties of tobacco, so many different grades of the same general variety, such differences,

in the processes of manufacture, and such extrordinary and fundamental differences in the tastes of the consumers, that it cannot be said that the various products compete with each other in the same way or to the same extent as with other staple goods.

Even if you consolidate several plants making cigarettes from a crop like the flue-cured tobacco, of Virginia, you have not joined together things which are necessarily competitive, for a consumer's attachment to one brand of cigarettes does not easily change to another, and he may give up smoking cigarettes altogether if he cannot find the brand to which he has been accustomed. It canot strictly be said that Havana cigars compete with domestic cigars, for the smoker of one rarely uses the other. And when we come to the great divisions of the tobacco trade, it is clear enough that there is very little, if any, competition among them. Cigarettes do not compete with plug tobacco. Snuff does not compete with cigars. Smoking tobacco does not compete with cheroots; all-tobacco cigarettes do not compete with paper cigarettes. Cigarettes made from Virginia tobacco do not compete to any extent with cigarettes made from Turkish tobacco. Dry snuff does not compete with wet snuff at all; and the snuff which is used by the Swedes in the northwest is in no competition with the wintergreen or other flavored snuffs which are consumed by the factory girls of New England.

Mr. Justice Holmes: I was wondering who it was that consumed snuff. You hardly ever see anybody take it.

Mr. Nicoll: It is consumed in the factories, I think.

Mr. Justice Holmes: It is consumed in the factories?

Mr. Nicoll: Yes. The theory of the Government throughout has been that every consolidation was

a consolidation of competitors, and that every purchase was a purchase of competitors.

Mr. Justice McKenna: Will you repeat that?

Mr. Nicoll: I say, the theory of the Government throughout has been that every consolidation was a consolidation of competitors, and that every purchase was a purchase of competitors. But I say that a careful examination of this Record will show, for the reasons which I have stated, that even in the original organization of the American Tobacco Company and the subsequent organization of the Continental and Snuff Companies, there was much less elimination of competition than would naturally be supposed; while the additional plants and brands purchased were often not in competition at all with the business to which they were added.

The American Tobacco Company, as it stands today, is not an aggregation of competing plants. It is rather an association in one company of the different non-competitive departments of the tobacco trade.

No Transaction Shown Violates First Section.

Coming now to the transactions shown, and without discussing whether or not these transactions relate directly to commerce, or whether they relate to anything but the instrumentalities of production as distinguished from the instrumentalities of commerce, we contend that these transactions are not contracts, combinations, or conspiracies within the meaning of the anti-trust law. It is a matter of history that after the Trans-Missouri case, the business interests of this country became greatly alarmed, and sought to obtain in the Joint Traffic case a modification of that decision. While the Court adhered to its former judgment, the late lamented Mr. Justice Peckham, who rendered the opinion of the Court, took occasion to say certain

things reassuring to the business interests of the country. Your Honors are familiar with his language. He wrote in part, as I recall it, that the formation of corporations for business purposes and the purchase of a competitor or the withdrawal from trade of a competitor had never been regarded as a violation of the Sherman law, notwithstanding the incidental suppression of competition. There is no manner of doubt that, after the decision of this Court in the Knight case, and the reassuring language of the Court in the Joint Traffic case, that the entire legal profession and all manufacturing interests believed that these transactions were lawful and did not offend the Sherman law.

I suppose the Court will take judicial notice of the fact that after these two decisions the era of consolidation in this country began. Seventeen States passed laws authorizing mergers, the organization of merged companies, and the holding of stock in one company by another. Is it possible that all lawyers and all laymen have made a mistake on this subject? You cannot say that all men intended to violate the law. It will not do to bring an indictment against all the business interests of the country. No! All men did not intend to violate the law. If the law was violated, then a mistake were made, and if all men were mistaken it is certainly one of the most unfortunate mistakes that has ever been made in the history of our affairs.

Now, all of this was fairly presented to the Court below. We relied on these cases, and we pointed out to the Court that the decision of the Court in the Northern Securities case had no application here. That was a case relating to railroads and this is a case of manufacturers. We contended that that was a case relating to the instrumentalities of commerce, and that this was a case which relates to the instrumentalities of production—not commerce, but the forerunner of commerce. We pointed out to the

Court that in the Northern Securities case the railroads were under the legal duty of competition, and the duty of continued existence in competition, while no such duty rests upon manufacturers, who may wind up their business and retire from trade at any time. We pointed out to the Court the language of the first section of the Anti-Trust Act, which condemned combinations in the form of trust or otherwise, and argued that this Court had decided that the formation of the Northern Securities Company was little different from the formation of a trust which had existed at the time of the passage of the Anti-Trust Act. For the Court held that the Northern Securities Company was but a custodian or trustee, and practically that the shares of stock of the Northern Securities Company were equivalent to the certificates of interest, which in the former trust had been issued by the trustees who held the stocks of competing companies.

All this, I say, we argued; but the Government contended in the Court below that the suppression of competition, whether by the formation of a corporation, or whether by the purchase of a competitor, constituted a violation of the Sherman law; and the Court so held, even going to the extent of saying that the formation of a partnership by two expressmen who were conducting a small trade across State lines was a violation of the Act.

Government's Changed Position.

I am not at all surprised that upon this argument the Government has beat a swift retreat, or that it stands aghast at the consequences of its own contention. But the fact remains that the decision of the Court below was brought about because of the insistence of the learned Assistant Attorney-General that this Court had established the rule of competition in all cases, even for manufacturers.

Now, the Government has changed its position. The main brief, which bears the signature of the Attorney-General and the learned Assistant Attorney-General, repudiates the decision of the Court below altogether, and seeks to maintain the decree upon different grounds. They say (pp. 52-3 of their brief):

"Of course we do not insist that *every* contract or arrangement which causes the elimination of a competitor in interstate trade is necessarily unlawful. The statute was intended to foster, not destroy, business operations, universally regarded as promotive of the public welfare.

"Accordingly, we do not avouch, and will not attempt to support the extreme construction of the Act adopted by the presiding judge below under which he declared, in substance, that it would be unlawful for any two individuals driving rival express wagons between villages in contiguous States to combine forces by forming a partnership," and so forth, as I have quoted it.

And in another part of the brief, at page 99, we find this statement of the Government's present position: That even a concentration of competing businesses, resulting in power to control prices or stifle competition, is not within the Act, provided the concentration occurs as an incident to the orderly growth and development of one of them.

Mr. Justice Lurton: From what page do you get that?

Mr. Nicoll: From page 99 of the brief for the United States. These are important concessions which, in my judgment, ought to result in a reversal of the judgment and dismissal of the Government's bill. The new contentions which the Government now puts forth, as we understand them, are equally untenable. At all events, we unite with the Government in a repudiation of the opinion of the Court below. We join with them in stating that the elimi-

nation of competition is not the test of violation of the Sherman law. We unite with the Government now in saying to this Court that every contract or arrangement which causes the elimination of a competitor is not necessarily unlawful, and that a concentration of competing businesses occurring as an incident to orderly growth and development with its resulting power over prices does not offend the Act, even if competition previously existing is terminated. And we say, as I have just endeavored to point out to you in giving the story of the birth and growth of the American Tobacco Company, that the history of the development of this Company is the history of the lawful and orderly growth and development of a great business.

You will search in vain to find in this Record any of the transactions which this Court has condemned in many decided cases. There is nothing here such as was denounced in the Addyston Pipe & Foundry case, or in Montague *vs.* Lowry, or in the Continental Wall Paper case, or in many of the decisions in the Federal courts where contracts between independent manufacturers not to compete or to maintain price, or to divide territory, have been condemned. There is certainly no evidence in this Record of a plan or scheme to restrain trade such as Mr. Justice Holmes pointed out in the Swift case, or such as Mr. Justice McKenna pointed out in the Shawnee case.

Government's Present Position.

What, now, are the contentions of the Government? I confess that I have found some difficulty in comprehending them. The best we are able to do with regard to the first section is this. Our view of the present attitude of the Government with respect to the first section is as follows:

First. Although competition may be eliminated by the purchase of competitors, and although there

may be a concentration of competing businesses brought about by orderly development without violating the Act, yet the Record in this case shows an actual intention to restrain trade.

Second. Such actual intention to restrain trade is, however, not very material; and if the evidence of such actual intention can not be found in this Record, nevertheless, the Act is violated because the necessary effect of the defendants' business operations is to directly impose material restraint upon interstate commerce by the suppression of free competition in what is called its broad and general sense.

Your Honors interrogated the learned Assistant Attorney-General yesterday about his position. I have spelled out the present position of the Government relying upon quotations from the brief, and have put it in those two propositions. Now, let us take them up in order.

The Chief Justice: Just read the propositions again.

Mr. Nicoll: The two propositions?

The Chief Justice: Yes.

Mr. Justice McKenna: Are these propositions stated as you are now stating them in your brief?

Mr. Nicoll: Are they in my brief?

Mr. Justice McKenna: Yes.

Mr. Nicoll: No; they are not in my brief. This is my argument, after reading the Attorney-General's brief.

The Chief Justice: That is what I am trying to get at. I ask you to restate them.

Mr. Nicoll: I will state them. Your Honors understand that this is our interpretation of the Government's present position?

Mr. Justice McKenna: Yes.

Mr. Nicoll: We may be wrong as to that; but, of

course, if we are the Attorney-General will say so. These are the two propositions:

First. Although competition may be eliminated by the purchase of competitors, and although there may be a concentration of competing businesses brought about by orderly development without violating the Act, yet the Record in this case shows an actual intention to restrain trade.

Second. Such actual intention to restrain trade is, however, not very material; and if the evidence of such actual intention is not to be found in the Record, nevertheless, the Act is violated because the necessary effect of the defendant's business operations is to directly impose material restraints upon interstate commerce by the suppression of free competition in what is called its broad and general sense.

No Intention to Restrain Trade.

Now, let us take them up in order. Where does the Government discover in this Record any such actual intention to restrain trade? You certainly cannot discover it in the history of the organization of the American Tobacco Company in 1890—a lawful consolidation at the time—a lawful consolidation brought about for the purpose of fostering the trade of the parties interested. You certainly cannot discover it in the fact that afterwards it made purchases which were really necessary to preserve the existence of the Company, such as plug, smoking tobacco and little cigars, to meet the prejudice which had arisen against paper cigarettes. You certainly cannot discover it in the sale of our plug business to the Continental Tobacco Company, or in the sale of our snuff business to the Snuff Company, or in the sale of our cheroot business to the Cigar Company.

We never bought to suppress competition.

Mr. Justice McKenna: That is another proposi-

tion—to say that you did not. Does that destroy the argument of the other side?

Mr. Nicoll: The other side said that we did, and that that is where they discovered it; but I say there is nothing to their argument. We never bought to suppress competition. Take the very first purchases. We had no cheroot business, and we bought a cheroot factory. We had no plug business, and we bought a plug factory. We had no business in little cigars, and we bought three factories engaged in their manufacture. None of these were competing businesses. And afterward, every brand and every factory that we bought we bought as an investment. We bought for cash or the equivalent of cash. Every single investment that we have made has been in a brand out of which we thought we could make money, and in most instances we have not been disappointed.

Most of the purchases were made from 1890 to 1901, but there were periods of months and years when no purchases were made at all.

For every purchase there were good and sufficient reasons, fully stated in the clear and convincing testimony of Mr. Duke, the President of the American Tobacco Company, which I trust your Honors will read. Sometimes a purchase was made because the factory manufactured a kind of product entirely different from anything manufactured by the American Tobacco Company or the Continental Tobacco Company; sometimes because we saw in a dormant brand great possibilities of development; sometimes because a brand had achieved a sudden popularity without pushing; sometimes because we needed the large supply of tobacco leaf which a factory happened to have on hand; sometimes because the factory had an exceptionally good location; sometimes because the business was conducted upon a different selling plan; and sometimes be-

cause there was an opportunity to purchase on account of death or a desire to withdraw from business. But always it was for reasons which would appeal to business men who were anxious and able to develop and expand along lines with which they were familiar.

Now, if you cannot discover evidences of actual intent in these purchases and original consolidation, where do you discover it?

The Covenants.

The learned Attorney General says:

> "We discover it in the covenants which you took from the vendors. You took in almost every instance from the vendors a covenant, upon the sale of the business, or the brand, not to engage in business within a certain territory for a certain time; and the fact that you took so many of those covenants is evidence of your intention to restrain trade."

The facts in regard to the covenants were these: There were no covenants taken from the original manufacturers who transferred their business to the American Tobacco Company; but experience soon showed that if the value of the business and brand transferred was to be preserved covenants were necessary.

Mr. Justice McKenna: Will you repeat that, please?

Mr. Nicoll: I say, there were no covenants taken from the original manufacturers who transferred their business to the American Tobacco Company; but experience soon showed that these covenants were necessary if we were to preserve the value of the business. The covenants required the covenantor not to engage in business in competition with the property transferred for a given period of time, and practically throughout the United States.

Were they reasonable covenants? Certainly the time was reasonable, the period being from one to fifteen years. Was the space reasonable? The evidence in this case shows that the brands are sold all over the United States; that Virginia tobacco is popular in New England; that the tobacco manufactured in the Carolinas has its greatest sale on the Pacific Coast. So that to preserve the brands the covenants must be extensive. But more important than that, as bearing on the question whether or not these covenants were taken for the purpose of restraining trade, is the fact that no covenants were taken from men who were skilled in the tobacco business. We took covenants from the owners of the business, whose names were often identified with the trade-mark, such as "Blackwell's Durham tobacco," "Spaulding & Merrick's tobacco," "Anargyros' Cigarettes," and other instances of that sort. Many manufacturers of tobacco use their own names, and make it a part of the trade-mark. So, of course, we took the covenants from the owners of the business, but not from the men who were actually capable of manufacturing the tobacco. At all stages of our growth and development there existed, and there exists to-day in the United States, thousands and thousands of men who were brought up in the tobacco business, and who are able to go into it whenever the occasion serves.

This practice of taking covenants was the result of a bitter experience on our part. In 1890 we bought from the J. Wright Company, of Richmond, all its brands, including one entitled "Winner," one called "Pride of Virginia," and one called "Master Workman." The gentlemen in the J. Wright Company took our money and immediately organized the United States Tobacco Company, and put out an advertisement that they were manufacturing a brand called "Central Union," which they claimed was precisely the same thing as the brand called

"Winner," which they had sold to us; that their brand "Pride of the East" was the same thing as "Pride of Virginia" which they had sold to us; and that their brand "U. S. Plug" was the same as "Master Workman" which they had sold to us (Vol. II, pp. 705-6).

We had still another experience: After we bought Liggett & Myers, Mr. Moses C. Wetmore, who had been the president of that company, and who had received part of the proceeds which we had paid, organized the Wetmore Tobacco Company, and announced to the public that, notwithstanding the fact that he had sold to us the "Star" brand, which was the great brand of Liggett & Myers, that he had preserved the formula, and that he was now proposing to manufacture the same brand under the same formula with the same employees that had been employed by Liggett & Myers (Vol. IV, pp. 446-7).

We had still another experience in the case of the Scotten-Dillon Tobacco Company. Upon the organization of the Continental Tobacco Company in 1898, Mr. Daniel Scotten had transferred the property of this company to the Cotinental Tobacco Company. We took from him a covenant for a year or a year and a half. At the expiration of that time he came to the American Tobacco Company and bought the factory of the old company in Detroit. We had ceased to use it, manufacturing the brands, for economical purposes, elsewhere. We actually sold him the factory to go into business, a very generous act on the part of these conspirators against trade and commerce. We sold him the factory, and he proceeded to go into the manufacture of plug and smoking tobacco, and announced to the trade that he was prepared to manufacture a full line of tobaccos precisely of the same quality as

those manufactured by the company that he had sold to us, he saying:

> "Dealers and consumers throughout the United States are acquainted with the quality of the goods manufactured for twenty years by the Daniel Scotten Company, and as nearly the entire force of employes of former years will be with us, our consequent aim will be to place upon the market a superior line of goods" (Vols. II, p. 708, IV, p. 448).

It seems to us that experiences of this sort furnish a complete justification for taking the covenants which we afterwards took for the protection of our property.

Leaf Buying.

The Government says:

> "We discover an evidence of your actual intention to restrain trade in your methods of buying leaf."

To this we reply that there has been no substantial lessening of competition in the purchase of tobacco leaf; that tobacco leaf is bought now, as it always has been, in competition; and that, on account of the conditions peculiar to the growth of tobacco leaf it is immaterial whether it is bought in competition or whether there is only one buyer. It appears that there are four great crops of tobacco in the United States. There are six minor crops. There is the Virginia flue-cured crop—a very large one, amounting to about 200,000,000 pounds a year. Then there is the dark western crop, grown for the most part in Tennessee. Then there is the well-known burley crop, and then the great seed leaf crop, from which cigars are made, which grows in Connecticut, Pennsylvania, New York, Ohio, and Wisconsin. The claim is now made——

Mr. Justice Harlan: Does it not grow in some other States—the burley tobacco?

Mr. Nicoll: Burley grows now in some other States. A great deal grows now in Virginia—almost as much as in Kentucky. The claim is now made that before the organization of the American Tobacco Company there was great competition in the purchase of leaf tobacco, which has been suppressed as a result of its organization. But I say that the record in this case shows that all these tobaccos are sold in competition.

Mr. Justice Lurton: Is there anything in this Record concerning an organization of the tobacco planters in the black tobacco district, or the burley district, to maintain the price of tobacco?

Mr. Nicoll: Not a word.

Mr. Justice Lurton (continuing). By reason of the effect of these organizations and combinations?

Mr. Nicoll: There is nothing of that kind in the Record.

Mr. Justice Lurton: Is there anything here that indicates those great organizations of night riders which are on foot for the alleged purpose of compelling the planters to adhere to their contracts by which their crops are put in the hands of committees for the purpose of selling them? Is there anything in this Record about that?

Mr. Nicoll: There is not a word. There is a letter (Vol. IV, p. 432) here from Mr. Duke, the president of the American Tobacco Company, written many years ago, refusing to enter into any combination or any organization of the planters; but there is nothing on the subject that your Honor speaks of.

Now, I was saying that in the flue-cured district of Virginia much of the tobacco is sold at auction. It is brought to the markets in wagons by the farmers. It is then thrown in loose piles, inspected

by buyers, and put up at auction to the highest bidder. The farmer reserves the right to withdraw his contribution unless he is satisfied with the price. In the burley and dark western district there is a different method of selling it. There the tobacco is packed in hogsheads which are brought to the market. Samples are then taken, and it is sold at auction by sample. These markets are called "breaks," a term that your Honors will find in the Record, which has arisen from the breaking of the original package.

In later years a practice has grown up of buying from the farmer direct, but only a small portion of the tobacco is bought in that way.

Now, I say that practically all of this tobacco is sold to the highest bidder, and these are the competitors: The first competitor is the American Tobacco Company; then the companies in which the American Tobacco Company is interested, but which have a separate buying organization of their own, such as the Snuff Company, manufacturing entirely different kinds of goods from that manufactured by the American Tobacco Company. Then the Cigar Company; the Stogie Company; then the representatives of foreign governments—France, Austria, Italy, Spain, Portugal, and Japan, all of whom have buyers upon the markets. They are known as the Regie buyers, and they purchase a very large amount of the crop, probably 100,000,000 pounds a year. Then there are the speculators in tobacco, who are a very numerous class; and then the Imperial Tobacco Company, here represented by Mr. Hornblower, which purchases annually 54,000,000 pounds. In addition to these there are all the independent manufacturers in every branch of the tobacco trade. So that I feel myself entirely justified in saying that the Record in this case proves beyond all question that tobacco is bought in competition.

If there is one fact which stands out in this record above all the rest, it is this: That the prices of tobacco leaf have been constantly increasing ever since the organization of the American Tobacco Company. In some instances the price has increased one hundred per cent.

The Chief Justice: You are stating now that there has been an increase of the price. Do you get at the increased price by the average price of tobacco, or how do you get at it?

Mr. Nicoll: We take a series of years, and find out what it has sold at per pound in each year.

The Chief Justice: In each year? Do you mean the average during the year?

Mr. Nicoll: Yes.

The Chief Justice: You are not taking certain periods of the year?

Mr. Nicoll: No, sir; I am taking the average.

The Chief Justice: Now, has the effect of this competition been to lower the prices when the American Tobacco Company was buying and thereby acquiring the production of the producer, and then to raise the prices? That might be done ruthlessly, and yet the average might not show it.

Mr. Nicoll: There is nothing of that sort in the Record, your Honor.

The Chief Justice: You have not anything as to the fluctuation of the prices?

Mr. Nicoll: We have a great deal. We have tables here, to be found in Volume 5 as one of the exhibits in the case, dealing with the annual crop and purchases.

Mr. Justice Lurton: Do they deal with the different types of tobacco?

Mr. Nicoll: Yes; they deal with the different types of tobacco. All of the different types are dealt with in this table.

Mr. Justice Lurton: A great part of the tobacco of Ohio is burley.

Mr. Nicoll: That has greatly increased in price.

The Chief Justice: Do I understand you to say that you are making a statement of fact now?

Mr. Nicoll: Yes.

The Chief Justice: It is very important to get the facts accurately, and not to gloss them. Do I understand you to say that this Record establishes that at the marketing season, the general season when the producer of tobacco would be expected to market his crop, that there has been a general increase in the price of tobacco?

Mr. Nicoll: I certainly do mean to say just that (see Vol. II, pp. 126, 184; Vol. III, pp. 228-9; Vol. IV, pp. 266-272, 421, 522).

Mr. Justice Lamar: Have you any table that shows how that advance compares with the general advance in prices?

Mr. Nicoll: You will find a table in the Record; but the Government has furnished your Honors with a table, Appendix C, to its brief, from the Year Book of the Department of Agriculture. For my own part, I do not commend that table to the Court, because in my reply brief (p. 12 and its appendix) I show that those figures are not satisfactory at all, but extremely inaccurate; but the Record itself contains all these facts.

The Chief Justice: I do not want to interrupt you. I wanted to know the meaning of the terms you were using. That was all.

Mr. Nicoll: I am glad to be interrupted. I was just about saying that there has never been a time in the history of the country when the price of tobacco leaf has been as high as in the last few years, and that is shown by the Record. The Government says that the American Tobacco Company is not entitled to any credit for this. It is true that we do not claim that we have tried to increase the price of tobacco. All we claim is that

we have enormously increased the demand for tobacco; and that we have not interfered at all with the natural law of supply and demand, upon which, in the last analysis, the price depends. Your Honors must keep in minds that the lands where tobacco is grown are also available for other crops. The farmer may grow tobacco or cotton or hemp or grass, or he may use his land for grazing. So that tobacco is in competition with all these other products. Unless a farmer can get an adequate price for tobacco he will put his land in cotton or grass; but the users of tobacco, the manufacturers, must have it, or their factories must close; and they must pay the farmer a fair price for it as compared with the price which he can get for other crops or he will not grow it at all.

The Chief Justice: Is not that a generalization? Is that established in the Record?

Mr. Nicoll: That is established beyond a reasonable doubt (see Vol. II, pp. 124-5, 187; Vol. IV, pp. 421-2, 522-3).

The Chief Justice: I merely put you that question. You spoke of the facts, and I put you that question. I have a country in my mind where a farmer, a very honest and straightforward farmer, told me that in consequence of operations—I do not say how, or why, or whether it came from the price of tobacco—he had practically been ruined; because whilst it was very profitable to use his land for tobacco it was not possible for him to make a living out of his land using it for grain or for grass; that his was essentially a tobacco country, and that if you deprived him of the right to grow his tobacco it meant ruin to that section. He may have been mistaken; and so I ask you, does the proof establish this generalization?

Mr. Nicoll: That must have been a very exceptional instance.

The Chief Justice: What is that?

Mr. Nicoll: That must have been a very exceptional instance.

The Chief Justice: I do not mean to say that it was an accurate one.

Mr. Nicoll: Take, for instance, land in Kentucky, in the Blue Grass region. There could not be any question about the ability there——

Mr. Justice Harlan: There is a very small portion of that State that is embraced in the Blue Grass region.

The Chief Justice: The country between Winchester, practically, and the Ohio River, is called the Blue Grass region.

Mr. Justice Harlan: The Blue Grass region is practically in the center of the State, and does not embrace more than fifteen per cent. of the whole territory of the State.

The Chief Justice: I do not want to interrupt you, Mr. Nicoll.

Mr. Nicoll: I am glad to have you interrupt me. I feel so confident on this thing about the Record that I am glad to have your Honors ask me any questions with regard to it.

Methods of Competition.

Now, after all, the main contention of the learned Attorney-General is that the evidence of our intention to restrain trade is to be found in our methods of competition, which the petition charges, in general terms, to have been unfair, oppressive and coercive.

Only nine witnesses were called by the Government to make any complaint of our methods of competition. I consider this a most surprising circumstance. When you consider the enormous powers of investigation conferred upon the Government as the result of the decision in the case of Hale *vs.* Henkel, the enormous amount of money which

has been appropriated by Congress for this purpose, and the great number of able and distinguished lawyers who have been retained for the purpose of making these investigations, this beggarly showing becomes all the more surprising. At the time when this case was tried the American Tobacco Company had been engaged in business for eighteen years. During that period millions of men had come in contact with it as growers, manufacturers and consumers of tobacco; during that period it bought many plants, some of which had been in competition with it; it introduced new methods of doing business; it put in operation many economies; it wrought changes in the method of conducting the tobacco trade; it discharged many employes. If it is true, as charged in this petition, that its growth and prosperity were due to unfair methods of competition which have injured competitors, driven some persons out of the trade and deterred others from entering it, it is almost incredible that the Government should have been unable to produce some direct and weighty evidence tending to prove the charge. Yet, as I say, only nine witnesses were produced, and for the most part their testimony is so weak and uncertain as to be little more than trivial. What a beggarly showing when we compare it with the extravagant language of this petition!

Now, who were the nine? There was one speculator in tobacco; two jobbers; one retailer; four salesmen, and one manufacturer.

The speculator was Mr. Dunkerson, of Louisville, Kentucky. His only complaint was that he was unable to continue in business because the American Tobacco Company paid more to the farmer than he could afford to pay and make his profit (Vol. IV, p. 103).

Mr. Justice Harlan: What farmer do you refer to?

Mr. Nicoll: Mr. Dunkerson was buying from the farmers as a speculator, and when the American Tobacco Company increased the price to the farmer, he felt that that was more than he could pay and make a profit, so he went out of business and turned his attention to the export tobacco trade in which he has greatly prospered.

Mr. Justice Harlan: Do you mean to be understood as saying that the American Tobacco Company pay the Kentucky farmers more than other people?

Mr. Nicoll: No; they paid more than Mr. Dunkerson was willing to pay. One jobber was Mr. Hillman, of New York. If what he said can be construed into a complaint, it amounts to this: That the American Tobacco Company sold all its goods through one jobber in New York City, namely, the Metropolitan Tobacco Company, a jobbing concern formed by the consolidation of many large jobbers, and that prior to its organization a large number of tobacco jobbers had done a prosperous trade. This, no doubt, was true, but can fault be found with the American Tobacco Company because it chose to sell its goods through one large jobber in a given territory? So far as Mr. Hillman was concerned, his examination showed that his business had increased from year to year, although he refused to handle the goods of the American Tobacco Company, confining his distribution to the goods of the independents, while the Metropolitan Tobacco Company, a concern in which the American Tobacco Company never had an interest, handled the goods of the American Tobacco Company and of the independents alike.

The other jobber was Mr. Mathews, of Nashville, a wholesale grocer. He had handled the plug brands of the American Tobacco Company, but gave them up and confined his attention to those of the independents, because the American Tobacco Com-

pany would not fix the price for its goods and guarantee its maintenance, while some of the independents guaranteed the maintenance of the price and a profit of ten per cent. He continued, however, to handle our smoking brands. In a short time he found that he could make better sales of other goods by handling the American Tobacco Company's plug brands, whereupon he resumed their distribution (Vol. IV, p. 192).

The only retailer who made any complaint was Mr. Schulte, of New York, and he proved himself to be a past master in the ways of competition, and had devoloped a very large and constantly increasing business. I leave his case for the consideration of Mr. Stroock.

The four salesmen were Mr. Harrington, of the Larus Company, of Richmond, a successful manufacturer; Mr. Choate, of the Byfield Snuff Company; Mr. Stone, of the Richardson Company; and Mr. Fowler, of the United States Tobacco Company. The complaints of Harrington and Fowler were confined to the New England and Philadelphia deal of 1904, when, at the instance of the jobbers, the American Tobacco Company made, for a short time, an arrangement for the exclusive handling of their goods in those localities. Both of them testified that before and since then the business of their employers had steadily increased, and that even in that year it had suffered no substantial decline, because of their ability to secure distribution through other jobbers and retailers. I will discuss the testimony of Mr. Choate and Mr. Stone as I proceed.

The only manufacturer who made complaint was Mr. Puryear, of the Nashville Tobacco Works, referred to by Mr. McReynolds yesterday.

Alleged Instances of Unfair Competition.

Now, let us consider the instances of unfair competition to which the Government points as an evidence of our actual intention to restrain trade.

One charge is that the American Snuff Company endeavored to crush the Byfield Snuff Company, which was engaged in manufacturing a brand of Wintergreen snuff in the New England district, by introducing a brand called Checkerberry in competition with Red Top of the Byfield Company. The owner of the Byfield Company was Mr. Pearson, but Mr. Pearson did not come forward as a witness to make any complaint. Instead he sent his salesman, Mr. Choate, who complained that Checkerberry had been sold at less than cost for the purpose of driving out Red Top. It appeared, however, that during the very period when the Checkerberry snuff was competing in this district with the Red Top the business of the Byfield Snuff Company nearly doubled.

In 1903, when the competition commenced, the Byfield Company sold 110,000 pounds; in 1904, 125,000 pounds; in 1905, 130,000 pounds; in 1906, 140,000 pounds; and in 1907, 152,000 pounds. The Byfield Snuff Company started in the year 1804. Up to the year 1900 it had accumulated a business of 60,000 pounds a year. After four years of competition with the American Snuff Company its business had grown to 152,000 pounds, and not a pound, according to Mr. Choate, did it sell below cost (Vol. IV, pp. 313, 317-20, 511-2). Certainly there is nothing in this transaction to justify the charge that any injury was done to the Byfield Company by the introduction of Checkerberry. In fact it illustrates one of the peculiarities of the tobacco trade, that all brands grow by competition.

The next complaint was made by Mr. Stone, a salesman for R. P. Richardson & Company, and related to a time when he was in the employ of the

American Tobacco Company. He testified that in 1904, in the State of Mississippi, he sold for the American Tobacco Company a cigar called Lisco, together with Bull Durham tobacco, and with each pound of Bull Durham the Company gave away free another pound. The inference is that this was intended to crush Old North State tobacco, a brand selling in Mississippi and belonging to Mr. Stone's present employer, the R. P. Richardson, Jr., Company, Incorporated. He did not testify that any injury had been done to the Old North State. As a matter of fact, he evidently misunderstood the whole transaction, for it appeared from the testimony of Mr. Hill, of the American Tobacco Company, who was called to explain it, that the matter had nothing to do with the tobacco business at all, but that the Bull Durham was given to facilitate the sale of a brand of cigars known as the Lisco cigars, and that the expense involved in this Bull Durham gratis was charged, not to the Bull Durham brand, but to the Lisco cigar.

In this connection it is to be noted that while Stone was put forward by Richardson, the principal himself did not come to the witness stand. In the year 1903, the American Tobacco Company bought a majority of the stock of R. P. Richardson & Company, and before the present suit was begun the minority holders of the stock brought suit to set aside the contract under which the American Tobacco Company acquired the stock. The Richardson Company was made a defendant in the present suit and, as the minority stockholders are in control of its affairs, they were given an opportunity to exploit, for the benefit of the Government, all the charges it desired to make against the American Tobacco Company. The answer of the Richardson Company, which contains many charges against the American Tobacco Company, appears in the Record. Of course, its answer is not proof

It is not even verified, and no testimony was brought to support any of its accusations, except the trivial evidence of Mr. Stone.

In this connection I desire to call your Honors' attention to the brief which you have before you, filed by the Richardson Company. I make very severe criticism of that brief for the reason that the brief is based upon facts contained in an unverified answer, and which were not supported or attempted to be supported upon the trial of this case by any witness.

Now, another charge is that the American Tobacco Company, for the purpose of freezing out and coercing into a willingness to sell, other manufacturers of scrap tobacco, early in 1906, advanced the price of the raw material and at the same time reduced the price of the manufactured scrap goods, so that no scrap manufacturer could exist. The manufacture of scrap tobacco is a comparatively new business. The product is made from cigar clippings, and also from leaf not suitable for the manufacture of cigars. The American Tobacco Company had not engaged in this line of business until they bought, in 1899, the business of Luhrman & Wellman, in Cincinnati. Their ownership of that business being known, a combination was made against them by the labor unions and independents in the City of Cincinnati, and great difficulty was experienced in selling their goods. In order to meet this situation a new company was organized and its ownership kept secret. The price for cigar clippings was advanced, but only because it was necessary for the business. All this is explained by Mr. Duke, who, complaining that the American Tobacco Company was not getting its fair share of the scrap business, was met with the statement that sufficient clippings could not be procured. He advised the managers of the business to increase the price until they could get enough.

The Government says that the victim of this movement was Mr. Friedlander, who at that time was one of the leading independent scrap manufacturers, and it put him on the stand. He testified that he was not at all surprised at an advance in the clippings, because of the difficulty in securing them; that although he did not expect they would go higher than seventeen or eighteen cents, as a matter of fact they had advanced to twenty-two cents a pound. But during all this entire period of competition, during the scrap war, his business increased until he was making over $60,000 a year. And this had nothing to do with his selling out (Vol. IV, pp. 79-80).

Mr. Bloch, the leading manufacturer of scrap tobacco, always independent of the American Tobacco Company and in direct competition with it, testified that he started in the scrap business in 1889, and that his business had grown both in volume and in profits since that time, and that during the years of this scrap war his business had constantly increased. Although the Government insists that this scrap war was an instance of unfair competition on the part of the American Tobacco Company, the notable fact is that no witness was called to complain about it. None of the manufacturers who, it is said, were coerced, made any complaint. In fact, no one of them was called, save Mr. Friedlander, who testified that he had done a profitable business throughout.

Mr. Puryear, of the Nashville Tobacco Works, enjoys the unique distinction of being the only manufacturer who was called by the Government to support the charge of coercion to sell on account of the competitive methods of the American Tobacco Company.

The Nashville Tobacco Works in the year 1904 had a brand known as Old Statesman, which was selling in the Southern States. The business was

owned by Mr. Puryear and two others. Mr. Puryear testified that he was in part induced to make the sale of his business to the American Tobacco Company in 1906 because his firm was losing business on the brand of Old Statesman to a similar brand called Bull's Head, marketed in his section by the American Tobacco Company. He also testified that he believed Bull's Head was being marketed at 16 cents a pound, that he got his information from grocers' salesmen, and that that price, in his judgment, was less than the tobacco could be made and sold for.

In further support of its charge, the Government quotes a letter written to Nall & Williams, another corporation in which the American Tobacco Company had an interest, advising Nall & Williams to get out a brand in competition with one of the brands of the Nashville Tobacco Works. This letter was written by Mr. Dula, the Vice-President of the American Tobacco Company. But no such brand was put upon the market, and Mr. Puryear, when called to the witness-stand, made no complaint whatever of the competition of Nall & Williams, although he testified for the Government, after the counsel for the Government had in his possession the Nall & Williams' letter. He confined his complaint entirely to the competition of the brand of the American Tobacco Company called Bull's Head. As a matter of fact, Bull's Head was not sold at 16 cents a pound, but, after taking into account all trade discounts and rebates, it netted to the manufacturer thirty cents a pound (Vol. IV, pp. 570-1). Mr. Moore, of Nashville, who was a part owner with Mr. Puryear in the Nashville Tobacco Works and its President, did not corroborate Mr. Puryear, but testified that whatever damage had been done to the business of the Nashville Tobacco Works was due, not to Bull's Head, but to bad management (Vol. IV, pp. 186-7).

Other evidence showed that a nephew of Mr. Puryear's had gotten out a brand called Country Lad, in competition with his uncle's brand, and advertised it as being the same as Old Statesman. It also appeared that Mr. Strater, another independent manufacturer, was making a similar brand in the same market. Both of these were sold at the same price as Bull's Head.

Reference was made by the Assistant Attorney-General in the course of his argument yesterday to a letter written by Mr. Hill, the Vice-President of the American Tobacco Company, on July 11, 1903, to Stewart, at Rochester, N. Y., in reference to the shipment of Sovereign little cigars and cigarettes, and it was cited as an instance of spying on competitors. This letter was in the possession of the Government when it called as a witness Mr. George P. Butler, of the Butler-Butler, Incorporated, a corporation which manufactured these Sovereign cigars and cigarettes. Mr. Butler made no complaint of spying on the part of the American Tobacco Company, or other unfair conduct on its part, although he had been for many years a competitor; and he made no reference to the Sovereign cigars or cigarettes at all.

While Mr. Butler was on the stand he was asked this question (I am reading from the Record, Vol. III, pp. 576-7):

> "Q. In the tobacco business does there exist at present, or has there existed, from your recent experience with Butler-Butler and your previous experiences, a situation which would prevent an independent manufacturer of tobacco who knew how to make good goods, knew how to pack them so as to hit the public taste and fancy, with sufficient working capital, is there such a condition that such a manufacturer cannot exist and prosper in the tobacco business?
>
> "A. I should say that there was not any such condition but what a man with proper

talent, working capital and the luck of attractively package his goods would succeed.

"Q. Do you say that after your experience with Butler-Butler, Inc.?

"A. Yes.

"Q. Were you in any way connected with or informed as to the affairs of the Universal Tobacco Co.?

"A. Well, I knew a great deal of them.

"Q. They didn't succeed in business, did they?

"A. No, sir.

"Q. Was that because of the machinations and competition of the American Tobacco Co.?

"A. No, sir."

Secretly Controlled Companies.

A great deal is said by the Government about secretly controlled companies. One would suppose from these observations that these secretly controlled companies had something to do with the growth or development of the American Tobacco Company, or at least had substantially increased its trade. These companies had their greatest vogue in 1903 and 1904. There were none of them in 1907. There was no remarkable increase in the business of the American Tobacco Company in 1903 and 1904, and there was no diminution in 1907. Not only that, but there is not one scrap of evidence in this case that any damage was ever done to a competitor by a secretly controlled company.

I suppose that when a person buys stock in a company, there is no reason in law or in morals which requires him to make it public. But, as we proceed we will see that the American Tobacco Company had good and justifiable reasons for keeping their interest or ownership secret in certain cases.

There is spread through this record some correspondence between the officers of the American

Tobacco Company and some of these secretly controlled companies, and correspondence relating to other matters. As this correspondence seems to be the chief reliance of the Government in this case, and as it finds in it some intention on the part of the American Tobacco Company to restrain or monopolize trade, it is important to consider it. The Government in this case required the defendants to exhibit all of the correspondence conducted by the officers of the company in its several departments from the date of its organization down to the time of the bringing of the suit. There is no suggestion that any correspondence was withheld or destroyed. In this way the Government came into possession of at least 25,000 letters, written in the daily course of business either by the officers of the American Tobacco Company or addressed to them by others. Out of these 25,000 letters the Government has put in evidence in this case only 216 letters or parts of letters. Out of these 216 letters or parts of letters it has put in the brief thirty-seven letters or parts of letters. It is a reasonable inference that the remaining 24,784 letters which were examined by the Government contained nothing which would serve its purposes. So that our offending, if any, disclosed by the letters, is inconsequential.

The question naturally arises, why was the ownership in these companies kept secret for a time? Was it for the reasons assigned by the Government, to coerce and crush competitors? If so, what evidence is there that any competitor was so coerced? The only one who makes any claim of coercion is Mr. Puryear, of the Nashville Tobacco Works, and he makes no reference whatever to the operations of a secretly controlled company.

As a matter of fact, the reason for maintaining secrecy was entirely different. It was a matter not of aggression, but of self-defense. The independent

manufacturers, during this period of secret ownership, were endeavoring to extend their trade by creating prejudice against the American Tobacco Company on the ground that it was a trust, and they found it profitable to advertise their goods as anti-trust goods. At the same time they undertook to utilize to their advantage the differences of opinion between the labor unions and the American Tobacco Company with respect to the open shop. That difference was this: The American Tobacco Company has never objected to any person because he was a union man, and it has never prevented any of its employes from joining the union; but at the same time it has been unwilling that the labor organizations should unionize its shops, fix the rate of wages and the hours of labor, and other matters of that sort.

Meeting on the common ground of opposition to the American Tobacco Company, although for different reasons, some of the independent manufacturers and the labor unions entered into a combination or conspiracy to boycott the goods of the American Tobacco Company, and by this illegal means to prevent the sale of its products. It was a very powerful and effective combination; especially in the sections where the labor unions were strong. In the case of Friedlander, of Cincinnati, it was powerful enough to destroy seventy-five per cent. of his business over night (Vol. IV, pp. 84-6). The combination was at its best during the years 1903 and 1904. On one occasion during that period the Globe Tobacco Company of Detroit, a party to the conspiracy, issued this circular:

> "Organized Labor, Greeting: Beware of trusts. Why Patronize the Tobacco Trust? Eternal vigilance is the price of liberty" (Vol. II, p. 697).

Mr. Wetmore, of St. Louis, from whom we bought the Liggett & Meyers Company, and who afterwards

organized the Wetmore Company, made a speech which was printed on a card and which enjoyed a very great circulation in his section of the country, expressing the following sentiment:

> "The people are not going to stand idly by, to see their rights, privileges and living swept away. Chew Wetmore's best, union-made" (Vol. II, p. 698).

In Cincinnati, where the American Tobacco Company had an interest in a certain scrap business which had been kept secret for a time, as soon as the real ownership was discovered circulars were provided by the independents and distributed by the labor unions with the words on them: "Death to the users," and marked with skull and crossbones. The whole City of Cincinnati was flooded with these circulars. That was the occasion when, as I say, Mr. Friedlander's business was destroyed over night (Vol. IV, pp. 84-6).

During all this period the American Tobacco Company was not so much interested in keeping this secret as the minority stockholders in the companies in which they had acquired an interest. A typical instance is Mr. Pinkerton, of the Pinkerton Tobacco Company. An examination of his testimony reveals the reasons which induced him to persuade the American Tobacco Company to maintain secrecy. When it bought one of these concerns, it was a very natural thing for the men who were left in charge and who knew their own environments to say, "Well, we think your interest had better not be known on account of the prejudice which exists in this community against trust-made goods or on account of the hostility of the labor organizations."

I am not here to make any apologies for these secretly controlled companies. I contend that the maintenance of secrecy was justifiable under the circumstances and that it was made necessary on

account of the illegal and tyrannical acts of the combination between the independent manufacturers and the labor unions—a combination strong, powerful and unscrupulous, as well as illegal under the Danbury Hat case.

In this connection I will make reply to an instance referred to by the Assistant Attorney-General of a secretly controlled company. The Assistant Attorney-General says that we organized in New Orleans the Craft Tobacco Company and kept our relation to it secret in order to compete with the People's Tobacco Company. It is true that the People's Tobacco Company had started in competition with us, and had gotten up boycotts against our goods among the labor unions, and had successfully excluded us from a great part of the trade. We could not get it otherwise, so we cooperated with Mr. Craft in the organization of this Craft Company. What was the result? Before this suit was brought the People's Tobacco Company absolutely crushed the Craft Company. The American Tobacco Company disposed of its entire interest; and pending this suit the rout of the Craft Tobacco Company was completed, and it went out of business (Vol. II, pp. 646-8).

Generally speaking, these are the evidences of the actual intent to restrain trade with which we are charged by the Government—the volume of our output, our purchases of other plants, covenants with respect to vendors, suppression of competition in purchasing leaf, and the methods of competition which I have just been discussing. Out of all these the Government spells a purpose or intention to restrain trade. But if these fail to establish its contention—if, as a matter of fact, the history of the birth and growth of the American Tobacco Company, which I have just been discussing does not disclose the actual intention to restrain trade, then the contention is that, nevertheless, the neces-

sary effect or result of its existence and the appropriation of so large an amount of the tobacco business is, in itself, a restraint of trade because of the suppression of competition incidental to its development.

To this we reply, upon the authority of many cases, never overruled by this Court, that if the chief result of a combination formed to engage in or conduct interstate trade is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law even if its necessary effect is to incidentally and indirectly restrain competition. The act does not condemn all restraints of trade, but only those which are brought about by contracts, combinations or conspiracies which directly and immediately affect interstate commerce. Such restraints as are incidental or collateral were never intended.

How, then, has the freedom of trading been restrained by the operations of the American Tobacco Company? Certainly not by any diminution in the volume of trade, for all the evidence shows that that has been immensely increased; not by raising the prices of the manufactured products, or by diminishing the price of the raw material, for the price of the first has not increased, nor the latter diminished. All the evidence in the case points the other way. Not by agreements with competitors not to compete, or by agreements to act in concert with respect to prices; not by agreements to limit production or to divide territory; not by contracts for exclusive handling, for the one instance of that was induced by the jobbers themselves and was abandoned many years before this suit was brought. If the covenants taken from vendors required them to refrain from trade for a limited period of time, such covenants cannot be deemed restraints, because they were really a part of the good will of the business which was sold. If competition has been terminated

it was only by lawful consolidation or by the purchase of competitors for the legitimate purpose of business expansion. The methods of competition practiced by the defendants, as we shall see, have not driven out or deterred others from entering the tobacco trade. What burdens, then, have been put upon the free flow of commerce? How has it been restrained?

Monopolizing.

The Government, however, charges that we have monopolized or have attempted to monopolize part of the trade and commerce of the United States. This contention was not considered by the Court below, which based its decision upon the first section of the Act, and made no decision under the second section.

In discussing the meaning of the second section, the views of the Government and our own are far apart. Although the word "monopoly" is not used in the second section, the Government injects the word and claims that it was directed against monopoly as a status. It defines monopoly as any such dominant control over a branch of industry by unification of management as will enable the owner to control prices and output, or which tends to enable him so to do.

Of course this definition makes no distinction between an individual and a corporation; for it is evident that an individual by an acquisition of property might reach the degree of control which the Government describes as a monopoly. This construction of the Government is entirely at variance with the views recently expressed by the present Chief Executive of the United States, who is not only a great lawyer, but a great judge, and whose judgment in the Addystone Pipe & Foundry case was one of the most important contributions to the interpretation of the Sherman law,

adorned as it is with sound reasoning and great force and elegance of expression. It is as follows:

> "I conceive that it ('monopoly' under the Sherman Law) is not sufficiently defined by saying that it is the combination of a large part of the plants in the country engaged in the manufacture of a particular product in one corporation. There must be something more than the mere union of capital and plants before the law is violated. There must be some use by the company of the comparatively great size of its capital and plant and extent of its output, either to coerce persons to buy of it, rather than of a competitor, or to coerce those who would compete with it to give up their business. There must, in other words, be an element of duress in the conduct of its business towards the customers in the trade and its competitors before a mere aggregation of plants becomes an unlawful monopoly."

The second section, in our view, refers not to a status at all, but to activities. As I have said, the noun "monopoly" is not used at all. The section uses the verb "monopolize." Our contention is that concentration of capital is not monopolizing; business on a large scale is not monopolizing; an aggregation of plants is not monopolizing; unification of management and control do not constitute monopolizing. In enacting this law, Congress must be presumed to have had the common law in mind, and we may well turn to the common law definition to see whether or not that does not throw some light upon the meaning of the word as used by Congress. Monopoly at common law was "a license or privilege allowed by the King for the sole buying and selling, making, working, or using of anything whatsoever whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before." The word "monopolize" carries with it, therefore, the idea

of some activity resulting in exclusion or restraint. Our contention is that whatever the magnitude of the concern may be, however great the volume of business that may be in its hands, it is not guilty of the crime of monopolizing or attempting to monopolize unless it has done or is doing something by which there is either accomplished or attempted this result, namely, that the subjects in general—persons not connected with the concern—are restrained from that liberty of trading which they had before.

This interpretation of the Act makes the second section understandable and supplements the first section. The second section condemns as criminal not only every person who monopolizes trade or commerce, but also any part of such trade or commerce. If by monopolizing is meant a mere unification of ownership, to what extent must that proceed before the offending party shall have monopolized any part of trade or commerce? Is it ten per cent., twenty-five per cent., fifty per cent., or what? If the tendency towards monopoly is the criterion, to what extent must the tendency proceed before the line is crossed and criminality begins? Is it twenty-five, or fifty, or fifty-five or sixty per cent.? And does the rule fluctuate with different industries? Is not a tendency of forty per cent. in a branch of trade where the supply of raw material is limited more injurious than a tendency of eighty per cent. in a branch where there is no limit to the supply of the raw material? The second section of the Act is not directed against those who are conducting business on a large scale. It applies as well to either an individual or a combination, or aggregations of individuals, who have acquired only a part of the trade in some locality. It is directed against the individual or combination of individuals, wherever they are, whose course of conduct or whose unfair practices in any part of

trade prevents others from enjoying that liberty of trading which they had before. It condemns, in a word, those activities which exclude, or attempt to exclude, others from their constitutional right to engage in any branch of industry which they may see fit to select. And the course of conduct which is condemned is the course of conduct not allowable in competition at common law, and which is punishable either by indictment or suit for damages.

The great purpose of the Act was to protect the freedom of trading, and not to bring on an economic revolution. The first section is what we may call the contract section, because, after all, a combination or conspiracy is founded upon a contract. The first section of the Act declares, therefore, that the freedom of trading shall not be restrained by contract. And lest there should be some other way of preventing freedom of trading, the second section declares that the freedom of trading shall not be restrained by conduct—that is, by such conduct as will prevent the subject at large from enjoying that liberty of trading which he had before.

If this is the correct interpretation of the statute, let us examine the conduct of the defendants to see whether or not they are guilty of monopolizing or attempting to monopolize. Our view is that no combination or individual can be charged with monopolizing under this Act unless he excludes others or attempts to exclude others in certain ways, because only these ways are adequate to produce such a result:

The first is by preventing others from getting their fair requirements of the raw material.

Secondly, by preventing them from getting their fair requirements of machinery or other facilities necessary to produce a given commodity.

Third, by preventing them from the equal use of transportation facilities for the purpose of bringing raw material to the factory, or the manufactured product to the market.

And fourth, by preventing others from enjoying the free use of the machinery of distribution—in the tobacco trade, jobbers and retailers.

Let us test the conduct of these defendants with respect to these things. Certainly there is nothing in this evidence to show that these defendants have ever attempted to prevent any of their competitors from obtaining any of the raw material. They own no tobacco lands in the United States, and, as I have said, they purchase less than half the crop. There are thousands and thousands of acres of land in the United States which are available for tobacco. Every pound they purchased, they purchased in competition with others, and they purchased it only for their own needs. There is no instance to be found where any purchase of raw material was made for the purpose of depriving a competitor of his share of the raw material.

The next is: By preventing others from obtaining their fair requirements of machinery or other facilities.

There is no such contention as that in this case. It appears that before the American Tobacco Company was formed cigarettes were made by machinery. There is nothing to show that anybody who desired to manufacture cigarettes might not have obtained a license. Certainly the patents on cigarette machinery have expired long ago. The American Cigar Company owns a machine for the manufacture of cigars, but it has never been successful. Companies controlled by the defendants furnish their competitors with other materials necessary for manufacture, such as foil, bags, boxes and licorice, *et cetera*, at the same price as to them, and all of these materials can be procured from others.

As I have said several times in the course of my argument, the defendants have never prevented others from the equal use of transportation facilities. They have never enjoyed an advantage of this sort over their competitors.

This brings me to the last proposition: The defendants have never prevented others from enjoying the free use of the machinery of distribution in the tobacco business—jobbers and retailers.

I suppose that if your Honors, in looking through this Record, could see that these defendants have practically made it impossible for anybody to go into the tobacco business in the United States by reason of their conduct in obstructing the avenues of distribution, you would find some way to condemn us under the second section, because of our monopolizing conduct, by enjoining the continuance of such operations; but what I say is that it is proved in this Record, not only beyond a reasonable doubt, but to a demonstration, that the avenues of distribution for tobacco products have always been free and open, and are so to-day. So that any man with the smallest capital can go into the tobacco business in the United States.

I go much further than admitting that there is any balance of evidence on this branch of the case. I am satisfied that when I am through with my statement, one thing that every member of the Court will be satisfied with—whatever the Court may think about anything else—is that the avenues of distribution have never been obstructed by these defendants, but have always been open and free, and that any man can go into the tobacco trade tomorrow, and if he has the luck or skill to make a brand which will attract consumers, and he manages his business economically and skillfully, he can achieve success.

The Government, however, takes issue with us

on this contention, and insists that the avenues of distribution have not been free and open, by reason of our conduct, and they give three reasons. The first is that we own a few retail stores and one jobber. The second is because in 1904 we made a temporary arrangement for exclusive handling with some jobbers in New England and Philadelphia. The third is because we have paid commissions to a small number of jobbers.

Let us take these claims up in order. The first is that we own some retail stores and one jobber. There are in the United States 600,000 retailers of tobacco. We have an interest in 409. There are 599,591 stores in which we have no interest at all. There are over 5,000 jobbers of tobacco. The American Tobacco Company controls one and the American Cigar Company controls six.

Now, let us consider the New England and Philadelphia deal of 1904. The charge is made that by making an agreement for exclusive handling with jobbers in New England and Philadelphia all the goods of independent manufacturers were thrown out summarily, and that their business was interfered with. To begin with, this transaction for exclusive handling was not proposed by the American Tobacco Company, but by certain jobbers for their own benefit. As a result of that proposal the American Tobacco Company agreed with certain jobbers of New England and Philadelphia that if they would confine their sales to the products of the American Tobacco Company they would receive a special commission of six per cent. on their sales. This, however, was only a part of a general proposition made to those jobbers, the whole being that they should buy goods at a list price with two per cent. commission if they maintained the list, and then six per cent. additional for such ex-

clusive handling, giving to those who accepted the proposition eight per cent. The jobber who did not desire to handle their goods exclusively could still make a two per cent. profit, because his more favored competitor who received six per cent. was prevented from cutting the price. Now, in the first place, this method was definitely and finally abandoned in November, 1904, nearly three years before the institution of this litigation. It lasted only a few months. The American Tobacco Company tried the plan at the request of the jobber, not expecting to monopolize the trade, but expecting that a proportion of the jobbers would accept the proposition and make a profit on their goods, and refrain from handling the goods of competitors; whereas another proportion of the jobbers would not accept the proposition, but would devote their energies to selling the goods of competitors. No such plan as this could give any monopoly, because tobacco jobbers are not a privileged class created by patent. The jobber handling tobacco to-day may refrain from handling it to-morrow. The retailer of to-day is the jobber of to-morrow. As a matter of fact, the independents made such distribution during all this time as they desired through other jobbers and retailers.

Again, it is said that the avenues of distribution are obstructed because certain jobbers received a special commission from some of the defendants. It appears that the smoking department of the American Tobacco Company sells to 5,000 jobbers, and of these 5,000 jobbers it pays a special commission to 253. The purpose of this payment is to stimulate the efforts of the jobbers in the distribution of the products of the American Tobacco Company. But it is shown that the payment of such commissions is a customary thing in the tobacco trade and in other trades, and that independent competing manufacturers also pay com-

missions, and indeed, pay commissions for the same purpose to the same jobbers. The receipt of such a commission from one manufacturer entails no duty upon the jobber not to receive the same sort of special commission for the same sort of special service from any other manufacturer.

Now, all of the officers of the American Tobacco Company called by the Government upon their cross-examination clearly established that the avenues for the distribution of tobacco products had always been and are now open. But their testimony constitutes only a small part of the evidence upon this branch of the case. Other witnesses called by the Government and wholly independent of, or even hostile to the American Tobacco Company, testified to the same effect.

Testimony of Competitors and Jobbers.

Mr. Bendheim, President of the Metropolitan Tobacco Company, declares that his company was the sole customer of the American Tobacco Company in New York and received a five per cent. commission from it, but handled the tobacco and cigarettes of a large number of independent concerns, makes no report to the American Tobacco Company, and receives commissions from such independents.

Mr. Henry M. Stone, to whom I have referred before, a witness for the Government, salesman for Mr. Richardson, testified that in the Southwest, where he sells the tobacco of his present employer, he had no difficulty in making free distribution of his products.

Mr. Addison Fowler, a salesman for the United States Tobacco Company, called as a witness for the Government, said that since the fall of 1904 (that is, the occasion of the New England and Philadelphia deal) there had been no difficulty in securing the distribution of the products of his

company through all the jobbers through whom they desired to distribute them from the Atlantic to the Pacific coast.

Now, the defendants called in this case eleven of the great tobacco jobbers, doing business in all sections of the United States, with annual sales of $50,000,000. All of them testified in corroboration of the Government witnesses whom we have mentioned, that there was no restraint upon the distribution of tobacco by the American Tobacco Company or by companies in which it was interested, and that the avenues of distribution were free and open. They came from all parts of the United States.

There was Mr. Letts, from the North and Middle West, doing an annual business of $16,000,000.

There was Mr. McCord, from the Middle Southwest, doing a business of $12,000,000.

There was Nathan Eckstein, from the Pacific Coast; Mr. Brewster, the owner of a large house in Rochester; Mr. Wilson, one of the large New England jobbers at Hartford; Mr. Savage, of Bangor, Maine; Mr. Furst, of Charleston, S. C.; Mr. Jenkins, of Pittsburg; Mr. Deiches, of Baltimore; Mr. Johnson, of Utica; Mr. Sheppey, of Toledo, and Mr. Lee, of Detroit.

They all testified that the jobber could be of aid to the manufacturer in furthering the distribution of his goods; that that aid consisted in calling especially to the attention of the retailer, through drummers, particular brands, but that, after all, the success of particular brands could only be achieved by the manufacturer by the creation of a consumer's demand; that the giving of special commissions by manufacturers to distributers to stimulate their efforts had always been done by tobacco manufacturers other than the American Tobacco Company, and by manufacturers of other products than tobacco; that none of the defend-

ants had directly or indirectly required or asked them not to handle competing goods; and that all of them did handle competing goods to the extent desired by their customers. All of them, with two exceptions, however, testified that they did not, and did not want to handle the cigars made by the American Tobacco Company, preferring to handle the other independent brands of cigars. And that is a very significant circumstance when we come to consider the question of power.

In addition to all this proof, three of the great independent manufacturers of the United States—Mr. Bloch, the leading scrap manufacturer; Mr. Peper, the leading plug manufacturer, and Schinasi Brothers, the leading independent cigarette manufacturers—all testified that in marketing their products they have never found the channels of trade obstructed and have never had any difficulty in securing jobbers or retailers to handle their goods.

Now, for further proof that the defendants have not attempted to monopolize this trade, I say: First.—They have not sought to prevent their competitors from securing leaf tobacco. There is not a line of testimony in the record showing the purchase of a pound for any other purpose than to supply the requirements of the defendants.

Second.—The supply companies owned by the defendants, producing licorice paste, boxes, foil and bags, sell to competing manufacturers on substantially the same basis as to the defendants themselves.

Third.—The stores owned by the defendant tobacco manufacturers sell products of the competing tobacco manufacturers.

Fourth.—The jobbers who receive special allow-

ances from defendant manufacturers handle the goods of competing manufacturers.

Fifth.—The only two occasions when the Company adopted trade plans by which its customers were not at liberty to buy competing goods were occasions when such plans were suggested by the customers themselves, and were abandoned as poor business policy long before this suit was brought.

Sixth.—The American Tobacco Company, or its predecessor, the Continental Tobacco Company, sold a tobacco manufacturing plant to Scotten-Dillon Company with the knowledge that it was to be used as a competing factory.

Seventh.—No effort has been made to buy the large manufacturing establishments of Bloch Brothers, Peper, the Globe Tobacco Company, and Schinasi, all great, successful and aggressive competitors of the defendants.

Eighth.—A large part of the customers of the defendant, the American Tobacco Company, do not deal in the cigars of the American Cigar Company, although they know of the interest of the American Tobacco Company in the Cigar Company. This applies to those who receive special commissions.

Ninth.—The defendants have not taken from their employees, who are in possession of the secrets of manufacture, covenants not to engage in the tobacco business.

Tenth.—The defendants have never sought advantage over their competitors in transportation.

If this great array of facts and circumstances is not enough to prove that there has been no monopolizing or attempts to monopolize on the part of the defendants, we have two other great and overshadowing facts which I have reserved to the last, to show that the operations of these defendants have in no way interfered with the prosperity of their competitors in the tobacco trade. And, what is more important, that during the period of their prosper-

ity, and in strict competition with them, other great tobacco businesses have been built up.

The Success of Our Competitors.

The Record here shows beyond a doubt that all businesses—such as Bloch in the scrap business and Peper in the plug business, and many others—have continued to flourish during the entire growth of these defendants. But it shows, however, something even more important than that; and that is, that some of the most remarkable successes in the tobacco trade have occurred during this very period. I will mention three of them. The first is the case of the Scotten-Dillon Company, of Detroit.

I have already mentioned Mr. Scotten in discussing covenants. He had sold his business, the Daniel Scotten Company, of Detroit, to the Continental Tobacco Company, in 1899, giving a covenant not to re-engage in business for a short time. When his contract expired he bought from the Continental Tobacco Company the Detroit factory and organized the Scotten-Dillon Tobacco Company, with the very funds which its promoters had received three years before from the sale of its former business to the Continental Tobacco Company. He went into competition and has been in competition with the American Tobacco Company for the last ten or twelve years; and during that period he has built up a business in smoking and plug tobacco of from ten to twelve million pounds a year. His stock is worth two and a half times its par value, and it declares large and regular dividends.

Another case is that of the United States Tobacco Company, a concern which started in 1899 with the funds which its promoters had secured upon the sale of a former business to the Continental Tobacco Company. The evidence in this case is that the business of the United States Tobacco Company

has grown from year to year, and extends all over the United States, from ocean to ocean.

But the most remarkable of all is the case of Schinasi Brothers. They have been in the United States less than fifteen years; neither of them can quite speak the English language; they went into the cigarette business in the City of New York in competition with the American Tobacco Company, manufacturing certain brands of cigarettes out of blends of grades of Turkish tobacco. They are today the largest independent cigarette manufacturers in the United States. The United Cigar Stores Company handles almost as many of their cigarettes as of the American Tobacco Company. They are in the enjoyment from their business of a great income.

Now, this evidence is so overwhelming that it seems absolutely to dispose of the Government's contention that the defendants have monopolized or have attempted to monopolize the tobacco trade or any part of it.

Power or Tendency.

Confronted with these facts, the Government changes its position and argues that the Act is violated because the defendants have such a dominant position in the trade that they tend to a monopoly, or that they have the power to monopolize even if they have not exercised it.

In the Government's brief it is argued (I quote the words) at page 99:

> "Trade and commerce in any commodity are monopolized whenever, as the result of concentration of competing businesses—not occurring as an incident to the orderly growth and development of one of them—one or a few corporations (or persons) acting in concert practically acquire power to control prices and smother competition."

According to this view, a concentration of competing businesses, possessing power to control prices and smother competition, becomes a monopoly only when it does not occur as an incident of orderly growth and development. If its growth and development have been orderly it does not violate the Act, although its power over prices and competition may be the same. Yet how can the manner of its growth make any difference, if this is the correct test? The power would be the same in either case. A concentration of competing businesses brought about by disorderly or illegal means would have only the same power—no less and no more—than its virtuous counterpart whose growth had been orderly and legal throughout. How, then, can power over prices or competition be said to be the test?

The Act itself says nothing about tendency or power. These are not the things which are condemned by this criminal statute, which renders its violators liable to fine and imprisonment. Can men be convicted because they have acquired a large business which, on account of its size, tends to give them, for the time being, a greater control than others less fortunate? Shall men suffer because they have a power which they have never exercised? Are we to leave it to a jury to say, under this Act, when such a concern tends in the wrong direction? Such a construction of the statute would lead to intolerable oppression and injustice, and turn the administration of criminal law into a farce. A criminal statute ought at least to plainly point out the things which are forbidden.

But, as a matter of fact, the Record in this case shows that the defendants have no such power as is assigned to them by the Government, and that the only power which they possess is the power which large wealth, united with experience, gives to any great concern. The defendants certainly

have no power over the raw material. On the contrary, they are in the power of the producers of tobacco, who may grow it or not, as they please, and can only be tempted to produce a quantity sufficient for the defendants' needs by an attractive price. The farmer who produces tobacco is under no obligation to grow that crop. How can he be said to be in the power of the defendants? On the other hand, the defendants must have tobacco or their manufactories must close. As between the grower and the manufacturer of tobacco, who, then, has the ultimate power?

Certainly the defendants have no power over the facilities of transporting either the raw material or the raw product. They possess no exclusive processes of manufacture, except such as they may have invented or discovered for themselves, and they have no power over the avenues of distribution. With 5,000 jobbers and 600,000 retailers in the United States; with every retailer willing to become a jobber if the opportunity offers; with nothing to prevent any man, even with small capital, from becoming either a retailer or a jobber—how can it be said that the defendants have any power over the avenues of distribution? The only power they have over prices is in common with all other traders, to fix the prices of their own manufactured goods. They have no power to fix the prices of the raw material. Owing to another peculiarity of the tobacco business, even the prices of the manufactured goods cannot be easily changed without great risk. This is so serious that although the price of the raw material has steadily advanced from year to year, there has been no corresponding increase in the price of the manufactured product to the consumer. It must be remembered also that the American Tobacco Company has always had, and now has, actual competitors in every branch of the trade, and that it is always

confronted with a potential competition consisting of an almost unlimited amount of unemployed capital which is ready for investment in any field where prices are advanced to a point where they are abnormal or oppressive.

There are certain things in the Record which illustrate this want of power on the part of the defendants, and curiously enough one of them is this very New England and Philadelphia deal upon which so much stress has been laid by the Government.

Early in 1904, as we have seen, the defendants put on in New England and Philadelphia a plan for selling goods under which the jobber was guaranteed in his profit, and was to receive a better profit in consideration of confining his business to the goods of the defendants.

Recess.

Mr. Nicoll: If your Honors please: Before recess I was proceeding to call the Court's attention to some things in the record which seemed to me to indicate a lack of the power which is ascribed to us by the Government. One of them was this very New England and Philadelphia deal upon which so much stress has been laid. Your Honors will remember that in 1904 the defendants put into operation in New England and Philadelphia a plan for selling goods under which the jobber was guaranteed in his profits. He was to receive a better profit in consideration of confining his business to the goods of the defendants.

It is said that the effectiveness of this plan illustrates the power of the defendants. But there were two or three jobbers left in Philadelphia to handle the so-called independent goods, and two or three jobbers gave sufficient distribution. The plan did not affect the retailers at all, and the retailers were able to get all the goods they wanted

from the two or three jobbers who did not accept the plan. These defendants have but one jobber in New York City, and he handles everybody's goods —the American Tobacco Company's goods and those of the independents alike.

Finally the plan was abandoned, only a few months after it was tried—not because of its illegality, but because it was a poor trade scheme, and resulted in their geting less of the business and their competitors more of the business in the localities in which it was tried than they have obtained under the conditions which now prevail.

There is still another thing in the record which shows a want of power on the part of the defendants to exclude others from the trade; and that is, the conduct of the wholesalers who received special commissions from the American Tobacco Company on smoking tobacco, but who handled only a few of the cigars made by the American Cigar Company, in which the American Tobacco Company has a large interest. Why did not the Tobacco Company use the power which it is alleged to possess from the payment of this inside commission to force upon these jobbers the cigars of the American Cigar Company? The answer is easy. There did not exist the power to force upon the trade the kind of cigars, or brand that the consumers did not want. The defendants would have been foolish to have attempted to use any power that they had over the jobbers in that direction. The jobbers would have resented and successfully resisted any such attempt to use such power.

The truth is that in the tobacco business only two have the ultimate power—the farmer who will not grow, and the consumer who will not buy. Like the farmer, the consumer is an autocrat. In every store, side by side with every brand manufactured by these defendants, there are brands of independent manufacturers. The consumer takes his choice. The brand that he desires will be fur-

nished him by the retailer, because of the risk of losing the customer's business. The brand that the retailer wants will be furnished by the jobber because of the risk of losing the retailer's trade.

So, after all, there exists no power on the part of these defendants to oppress the tobacco-consuming public. They may fix the prices, to be sure, but only of their own product. And, if the consumer feels that he is being imposed upon, that his attachment for a particular brand is being presumed upon, that its quality is going down or its price going up, he has the remedy in his own hands.

The only power that these defendants possess is the power that is inherent in wealth. Are they to be banished from trade on that account? This theory of the Government would exclude a moderately rich man from any participation in a trade the volume of which is small, and a very rich man from any trade at all.

Of course, these defendants could be of injury to competing manufacturers by committing the folly of spending their surplus in the purchase, at exorbitant prices, of all tobacco leaf. And in the same way they could injure the manufacturer of cotton by buying all the cotton. And in just the same way—if they are as wealthy as they are reputed to be—Mr. Rockefeller or Mr. Carnegie could do the same thing as regards the manufacture of either cotton or tobacco.

Are the rich, on account of this inherent power, to be forbidden to exist?—rich corporations to be dissolved? These defendants could possibly do a great injury to the business of Scotten-Dillon and other competing manufacturers, by making the same sort of goods and giving them away. But their power is sufficient to do even greater injury to the manufacturer of cotton goods, or woolen goods, or steel, by using their money in making and giving away these articles.

I say they could do a greater injury to the cot-

ton or woolen or steel business than to the tobacco business; because, if there is one thing that is shown in this record, it is that the tobacco business is not created by the simple expenditure of money, and cannot be destroyed by the simple expenditure of money. A cut of one cent in the price of sugar might drive out small manufacturers, but a cut in the price of tobacco could have no such effect. Tobacco is a luxury, and men buy what they like, and they like what they are used to.

The manufacturer, for instance, who attempted to displace Bull Durham might spend millions of dollars, and find, after he had expended it, that Bull Durham was stronger than ever before. A man who smokes Bull Durham pays but five cents a package. It is exactly what he wants, he has been smoking it constantly, and he prefers to go right on getting the size package he is used to, of the identical goods he is used to, and paying the same price he is used to paying. So that the argument, unreasonable as it is, that these defendants ought to be condemned because of their wealth and the volume of their business, has less application to the tobacco business than to any other conceivable business.

There is still one thing shown by this Record which seems to me of extraordinary importance, and that is, that during the seventeen years which have elapsed since the organization of the American Tobacco Company, everyone connected with the tobacco business has prospered. The producers of tobacco have been getting more for their crops; every independent manufacturer has increased his business; new manufacturers have entered the field and made fortunes; jobbers and retailers have increased their sales; labor has been steadily employed at increased wages; and the consumers of tobacco now have a greater variety of better products at less prices. This extraordinary result, for extraordinary it is, has been brought about by the activi-

ties of the defendants. The enormous increase in the use and consumption of tobacco in the United States is due to them. Of course they have had the largest share of the return, because in certain lines theirs is the largest business; but all others have shared the general prosperity, each in his own proportion.

The Government makes much of the fact that profits have been made by the American Tobacco Company and dividends paid almost since its organization in 1889, the inference being that these were due to restraints put upon trade by occupying the market to the unlawful exclusion of others. No doubt the American Tobacco Company has been a successful concern; but is that any ground for condemning it? The question is not whether its profits have been large, but whether they have been obtained by improper or immoral advantages over their competitors. That large profits have been made is due to the unusual foresight, intelligence and activity of the defendants—the very qualities which the law approves. The field was open to all; but they were the first in this country to see the great possibilities of the brands which they acquired. Their success is the result of economical management, of business skill and the generous employment of methods calculated to create a constantly increasing demand among consumers for all kinds of tobacco products.

It appeared in the course of the statement of the learned Assistant Attorney-General that in 1905 or 1906 the total assets of the American Tobacco Company were $274,000,000. It also appears that on this capitalization the American Tobacco Company, during the year 1906, made, in addition to the amounts necessary to pay interest on the outstanding bonds, six per cent. upon the preferred stock and twenty-two and a half per cent. on the common

stock, the amount of $6,700,000, which was added to surplus. Adding the amount necessary to pay the interest on bonds and the dividends paid on the preferred and common stock, we find that there was a total earning by the American Tobacco Company during that year of $26,084,000 (some hundreds and some cents), or substantially less than ten per cent. on its assets.

The explanation of the fact of the large dividend paid on the common stock is that the business has been so conducted as to merit the confidence of the investing public, so that much the larger part of the investment is on a four or six per cent. basis. But without reference to that I think it may be safely assumed that profits of ten per cent. on the amount invested in an enterprise are only reasonable profits, whether the concern is large or small.

The history of the American Tobacco Company is the history of the expansion of trade—not of its restraint. The business structure which this Company has erected is a triumph of American intelligence and industry. It is the Government's largest taxpayer. The great patronage which its products have attests its popularity with the public. It has no enemies but competitors who would rise to fortune, or politicians who would rise to fame, upon its ruins. What more preposterous proposal was ever made to this Court than that it should lend its aid to destroy this great business, to raze to the ground this fabric of an American industry, to drive buyers from the markets until the tobacco rots upon the fields, to withdraw this pioneer of commerce from foreign marts, to injure producers, embarrass merchants, annoy consumers, and destroy the slowly-returning confidence of the financial and business world?

I cannot believe that any such proposal will find favor in this august tribunal, where common-sense prevails, where reason reigns, and where prejudice and passion play no part.

Oral Argument of John G. Johnson, Esq., January 10, 1911.

Mr. Johnson: May it please the Court:

It is hardly necessary to discuss the Wilson Act. That deals simply with importations and with combinations of importers. I refer to it only because of the very extraordinary new rule of interpretation which the learned Assistant Attorney-General invoked. He says: "I quote the Wilson Act, which comes years after the Sherman Act, because it has broader words of prohibition in it; and therefore you must read the first Act by the light of the later Act, which includes those words, in order to get at the legislative intent."

I always supposed that the rule of interpretation was this: That if I found the embodiment of the legislative will in certain words which meant one thing, and later found that there was a different and a later statute which embodied an entirely different and broader thing, the presumption to be drawn therefrom was that the original Act did not cover what was later put in the last Act. In the Wilson Act you find, boldly inserted, words which the learned Assistant Attorney-General infers from the other statute, which contains nothing of the sort. It uses the word "competition"; and it is leveled at combinations intended to operate in restraint of lawful trade, or to increase the market price, in the United States of imported articles.

If that was the legislative will, why, when the Sherman Act was passed, were not words like that inserted? Why should a man be punished by an Act which must be interpreted, according to this new code of interpretation, by the light of a later manifested legislative will, manifested by other Acts?

Decree of Circuit Court Anomalous and Unauthorized.

This case, as it comes before the Court, presents a most anomalous state of affairs. Under a statute designated to promote trade we have a decree which utterly forbids the entering into interstate commerce of the American Tobacco Company and its allied or owned companies and properties. With an output of $212,000,000 in 1906 of tobacco by those companies, a very considerable portion of which was put into interstate commerce, you have a decree that that Company is forbidden from transacting any business in interstate commerce; and of necessity the traders outside of that corporation, who furnish perhaps one-fourth of the tobacco product, are to do all the business.

Does it not challenge our attention when we find a decree is made under a statute intended to promote commerce that by necessity must absolutely prevent it? Does it not make us challenge the correctness of an interpretation of the statute which brings about any such result?

"Oh, but," they suggest, "the reason that decree is entered is not that interstate commerce to the extent of three-fourths shall be prevented; but if such a decree is entered, then these defendants, by reason of the destruction of the value of their property which ensues, will necessarily be driven to sell their property." But does not that amount to a punishment? Does not that amount to a decree by the Court that they shall be punished to such an extent by the deprivation of the use of their property that perforce they will do something which it is not within the power of the Court to compel them to do, and suffer a punishment which this Act, which is very specific in what it does by way of punishment, says nothing about?

Government's Vague and Strained Interpretation.

The trouble with the Government's interpretation is that it fails to disclose with sufficient clearness the offense condemned, and it requires the insertion of words to save the interpretation from self-destruction. And under that I have this to say:

This is a criminal statute. It is of the very essence of the criminal law that before a man can be condemned as a criminal, there shall be clearly defined by the body which enacts the law the offense which, if he be guilty of it, shall inflict upon him the punishment. In this case the Government is obliged (I will quote from their brief in a few moments) to use words which are not in the Act, in order in the first place to give it the meaning that they claim; and in the next place, in order to save it from the results of that meaning.

This very able brief is the result of a contemplation of the deficiencies, perhaps, of the earlier brief. It is the last effort to express something that will meet with judicial commendation. And this is what they say concerning this subject on page 22 of their brief:

"In order to satisfy the requirements of a reasonable necessity, there must be a certain nearness of relationship between what the statute directly strikes and interstate or foreign commerce which is probably not susceptible of rigorous definition. Mere indirect, incidental or remote effect on commerce is not sufficient; but whatever, as a natural and probable consequence, will occasion material hindrance to the efficacious operation of the lawful will of Congress in reference thereto is near enough."

On page 31 they try again:

> "We submit that under the power granted by the commerce clause, Congress may prohibit whatever"——

The mind must be rigorously directed in order to keep up with this—

> "May prohibit whatever as an efficient cause will probably occasion, as a natural and reasonable consequence, material obstruction or hindrance to efficacious operation of its lawful will."

Few are safe if crime is to be so complex in its definition.

> "In the law of torts long experience has compelled the doctrine that liability flows from the efficient cause and is not confined to that nearest to the injury. A similar imperious necessity requires acceptance of the principle now advocated."

Again, on page 32:

> "This reasoning * * * only asserts power to debar those engaged in production or manufacture from acts or transactions the direct and necessary consequences of which would be to nullify rules for the conduct of interstate commerce admittedly within the power of Congress to prescribe."

And still further, in order better to let the person who is not to sin unawares know what he must not do, on page 52, they say:

> "We do not maintain that *every* sort of restraint of interstate or foreign commerce is denounced by the Sherman Act; and certainly no such doctrine is essential to the relief asked."

But they do not contend (and of course they cannot, under the interpretation they put upon the Act) that every sort of restraint upon interstate or foreign commerce is denounced. And yet when we read the Act, we find these words:

> "*Every* contract, combination in the form of trust or otherwise * * * is hereby declared to be illegal."

Should we not pause when we find an interpretation put upon the statute by the Government which, because of the interpretation, obliges them as a necessary consequence to say that they do not claim that *every* restraint is illegal, when we find that statute without a word of exception, in the clearest possible language, providing that *every* restraint and combination and conspiracy in restraint of trade is illegal?

Again, on page 99, as a head-line, we find inserted this qualification:

> "Trade and commerce in any commodity are monopolized whenever as the result of the concentration of competing businesses—not occurring as an incident to the orderly growth and development of one of them"—so and so occurs.

Our construction of this statute is one which puts upon every word of the statute a meaning, and which does not excise from the statute a word that is put in with a most intense expression of force—to wit, the word "every." And where do they find in the statute the authority for the insertion of the word "material"? Some of the greatest legal intellects that have ever figured at the American bar, and graced it by their learning, struggled in this Court to induce it to reach a conclusion that it must insert before the word "restraint" the word "reasonable," and make those unexcepting words read according to what they said was a reasonable qualification—"a reasonable restraint." This Court said: "No! the statute says that every restraint of trade is illegal, and we are not permitted to remake the statute, or to insert anything else." And if they would not permit the insertion of the word "reasonable," upon what power can we rest the exclusion from the statute in this case of the word "every"?

In the statute there are no such words as "ma-

jor portion." There are no such words as "the necessary consequence will be a material hindrance." Necessarily any words that make the condemnation of the statute rest upon the Act according to its after-consequences, as to whether the Act does thereafter materially restrain or not, must be wrong; because whatever is forbidden is forbidden regardless of its consequences.

The Knight Case Rules This Case.

Therefore, having called your attention to the construction and the qualification of the construction resting upon nothing, let us proceed with a further consideration of the Act. And the next matter that I wish to discuss is that the Knight case rules the present case.

What was the Knight case? There was a sugar-refining company which was in possession of refineries and of sixty per cent. of the refining and trade in refined sugar in the United States. It acquired the shares of stock (paying for the same in its own shares of stock) of concerns representing thirty-six per cent. more of the refined sugar product in the United States. And it, therefore, was in the possession, by virtue of its acquisition of those shares, of ninety-six per cent. of the business. It was engaged in buying the raw sugar, and it was also engaged in selling its product in other States. The American Tobacco Company, or the original Company, formed before the Sherman Act, was a Company which at the time of the passage of the Sherman Act was in the possession of nearly ninety-seven per cent. of the cigarette manufacturing industry in the United States. From time to time it acquired very largely properties, occasionally shares of stock, so that it is now in the possession of cigarette manufacturing to an extent of about seventy-three per cent. as against ninety-seven per cent. that it originally owned, and we

may say roughly seventy-five per cent. of the manufacturing of other products of tobacco, excepting cigars.

It buys the leaf in other States, and it sells the raw product in other States. Therefore, in connection with its manufacturing, it does an interstate commerce business in the purchasing of its raw materials, and does an interstate commerce business in the shape of selling its products. In what respect does this Company differ from the other? It is very much more in itself a manufacturing company, because it manufactures a very large percentage of the product which is sold by it and by its allied companies.

I have seen somewhere the suggestion made that it did not appear in the Knight case that that company bought its raw sugar outside of Pennsylvania and that it sold its product in other States. But I suppose that unless a man had behind him the power of the Government, he would be rather careful in suggesting to this Court that at the time of the decision of that case it was not thoroughly aware of the fact that raw sugar was not raised in the State of Pennsylvania, and that the refined sugar was sold all through the country.

That case laid down no new doctrine. It was not a new evolution of the will of this Court. It quoted the antecedent cases upon which it rested which made the broad dividing line between the manufacturing of a product and the sale of that product in interstate commerce.

There is necessarily a well-defined distinction between the manufacturing of a product and the dealing with it in interstate commerce. No citizen of a State is obliged to cross the border. No citizen of a State is obliged to sell his product in interstate trade. He may be the owner of cotton land. He may be the owner of wheat land. He may be

the owner of a mine. As long as he is within that State, and his title to those things depends simply upon his ownership within the State and the State in which he is located, it is entirely within his power to agree with another man that he will not produce wheat or cotton. It is entirely within his power, so far as any Federal power to punish goes, to burn his factories. He has the absolute control of the production. All that is forbidden him is that if he does put his product into the channel of interstate commerce, he must violate none of its laws. But there is left with him the absolute discretion of whether he will so put it or not.

That is what the Knight case decided. And that case has stood since the decision (a period of over fifteen years) without any suggestion by any new legislative enactment amending it that the interpretation by this Court inadequately expressed the intention of the legislature; and it has been acted upon in all particulars since.

If a river runs through a State, no citizen of that State can put an obstruction in the channel of that river. But if he has on the banks any quantity of a product which might be put into interstate commerce, he is not obliged to put a penny's worth of that product into the stream of commerce. He is not obliged to dig channels for commerce. All that is forbidden him is that he shall not obstruct it. And the Knight case, as we take it, holds that to any extent he may within his State bargain for manufactories and for manufacturing, whatever may be the subsequent thing that is done with it, with no compulsion upon him to do that thing. There is no offense done by him in that which prevents him doing it.

Restraint of Trade Used in no New or Enlarged Sense.

The next proposition is that the Act discloses no intent to enlarge the meaning of the words "restraint of trade," or to create any new offense.

At common law there was a very large class of contracts that, because they were against public policy, were not enforcible. There would be at common law conspiracies which would be punishable because they got into the domain of crime. There was no Federal criminal common law. The purpose of this statute was to apply within the domain of the United States, to the extent it had jurisdiction over interstate commerce, the principles of the common law; to make those contracts which were not enforcible at common law illegal, and to make the conspiracies which existed at common law illegal. But bear in mind the situation when this Act was passed:

Congress was necessarily aware of the fact that in all the States there were being developed statutes authorizing a great increase in the capital which any corporations might indulge in. It was thoroughly aware of the fact that consolidations of those capitals were being made under the laws of the States. It was thoroughly aware of the fact that property was being bought and was being sold. It manifested in no way any disposition to deal with those things, but, on the contrary, confined itself to the words "combinations in restraint of trade."

There were at that time contracts which it made illegal by which a man restrained himself from the exercise of his own industry; by which men undertook by combination or contract to control prices and to regulate output. There were agreements in which in various ways they did that which was improper, and which was now penalized. But they used the words with which the common law was

familiar. They used the words which to every mind had a meaning to it, the words "restraint of trade." And therefore to hold that under that appellation they meant in any way to deal with a transaction of buying and selling, or to deal with anything that never before had come within the category of restraint of trade, is to give to them a meaning not justified by any language which they have used.

It is said that trusts were expressly prohibited by that Act, which is perfectly true. A combination in the form of trust was made illegal. But what was that combination in the form of trust? It was where separate ownerships, still maintained as separate ownerships, were attempted to be merged, not in the title but in the management, so that independent persons were controlled by the arrangement that was made, and restricted in doing their business at their own will.

They say: "If you can introduce in place of that a combination which you call a holding company, that is doing precisely the same thing as was done by these trusts." But it is not. The trust never dealt with the title. The holding company changes the title. In the case of the trust there were separate interests, and each will was coerced by the combination. In the case of the holding company you have a union of the interests; and the man who holds in that company is interested in the company itself doing the best it can in order to promote its interests and its trade.

But you have in this case no holding company. It is not necessary for us, for any purposes involved here, to have the holding company defined. This is a company which buys the properties, which to an enormous percentage manufactures itself and deals in trade. And you are asked to say that under a statute which uses no other words than "restraint of trade," a criminal restraint of trade

is brought about by a company, because it has a large amount of property, buying the property of others.

Acquisitions Not Forbidden.

The next proposition is that the actual acquisition of property not charged with a public use is not a combination, contract, or conspiracy in restraint of trade within the meaning of the Act.

What, in the first place, constitutes an acquisition? And in the second place, are there any words in the Act looking to its prohibition?

In this case we really acquire the property; and that property consists, to a very large extent, of brands, trade-marks. The value—the very great value, perhaps—of the holdings of this Company is in that thing which is purely built up as the good will of the man who holds the brand and sells it. And why may he not deal with that?

There are no words in the Act that look to the punishment of acquisition. How easy would it have been for Congress, if it meant to forbid that, to have said so! And why should they have used words which had in common parlance an entirely different meaning?

Acquisition was not condemned. If it was, this state of affairs would result: Competition is said to be the rule of trade. The necessary result of competition is destruction. The very purpose of competitors is that each competitor is desiring to take way from the other, and carry to himself (of course he must do it by legitimate means) the property of the other. But as the result of that competition one may go to the wall; and as the result of that going to the wall the other may be left in possession of the whole trade. Or, as the result of that competition, one of the men may find it no longer profitable to carry on his business. Or a

man who is in trade may become too old, or he may die, or he may become tired of his trade. And if you forbid acquisition, the inevitable result is that you punish two people: You punish the acquisitor by preventing him from acquiring; but you also punish the man who has a right of property (which includes within it the right to sell) by refusing to permit him to sell. Or you may have a man who, in order to build up a business to compete in foreign trade, may find that unless he does a business of a certain magnitude he will not be able to introduce the economies that will enable him successfully to compete. If he cannot acquire those properties, you necessarily prevent him, not from the competition within his own country, but from a better competition in the country beyond—the foreign country.

No Duty of Competition on Private Traders.

The next proposition is that there is no duty on the part of private trading companies or manufacturing companies to compete—no prohibition against their agreement not to compete. If there is no competition, as the result of acquisition, the Act is not violated.

The legislature cannot compel a man to compete. He may transact his business according to his own notions without being obliged to compete with anyone else. If he has a business which belongs to him (as many of these businesses belonged to the people who sold), and it is not to his interest to compete, you cannot compel him to do it. If he finds that he wishes to sell his business, and if the result of his selling the business is that there is no longer a competition between the two persons who formerly were independent, what is that but the necessary result of the acquisition of the property? If there is no

duty on the part of A and B to compete, then if A buys B or B buys A there is no violation of any law because the result of the purchase is that there is no competition, because there was no duty upon which that competition should rest.

No Acquisition Here to Restrain Trade.

The next proposition is that in the present case the fact is that the acquisition was not for the purpose of destroying or restraining trade, but to increase that of the acquisitors. The purpose was accomplished, and trade itself was increased.

My colleague has illustrated that and proven it by his argument. The petition that was filed in this case was full of averments of the doing of all sorts of illegal acts. When the Government came to prove those averments, they proved none of them. The Court below finds that they did not prove them. But we are told by the learned Assistant Attorney-General: "It was not necessary for me to prove those things. I did not want to injure people by calling them to testify in that matter." But where an averment of fact is made, where a man is accused of guilt, and it is said that there are persons who might prove that guilt, it will not do for him to say: "I will not call the persons out of regard for their feelings." Nor will it do to say, as was said here, that they did not prove it because the witnesses that they called did not tell the truth. There was no contradiction of the testimony of those witnesses; and there being no contradiction of their testimony, and there being no proof offered concerning the truthfulness of these averments, they necessarily failed.

The Northern Securities Case.

Then I wish to call the attention of the Court to the difference between this and the Northern Secur-

ities case. In the Northern Securities case, in the first instance, we were dealing with a public service corporation which had a duty to compete, and which by putting itself beyond the power of competing was denying the discharge of a public duty. There being no duty to compete on the part of private corporations, no such consequences can result from their non-competition. Besides that, what was done in that case was illegal under the Minnesota law, in which the courts were located. There was, therefore, no intrastate trade interfered with, because the intrastate trade could not be done in violation of the Minnesota law. And in addition to that, there was the mere holding, as was held, as a custodian for the purpose of accomplishing an illegal purpose.

Monopolizing.

The section of the Act which this Court has not dealt with is the second section, the monopolizing clause; and the proposition is that the monopolizing or attempt to monopolize which is condemned is one which includes more than acquisition, however extensive—that is, the exclusion of others from trade by means of the doing of an illegal act.

Ordinarily the chatter of legislative debates by those who intrude themselves in it merely for the purpose of demonstrating their existence may not help us much. But in this case we have a very exceptional position. This statute was introduced by Mr. Sherman, and very soon it was developed that there were several constitutional slip-knots in the statute as he drafted it. After a very considerable amount of debate, in which a very considerable amount of acumen and intelligence was displayed, it was finally turned over to the late Senator Hoar to draft the Act. He drafted the Act which, after a great many amendments that were offered in one

House and the other and accepted in conference meetings, was finally made to stand as the legislative will upon that subject—made to stand without any amendment at all. Under those circumstances, where the Act is the emanation from the mind of one person, we may get some information concerning its intent. And during the whole of the debates Senator Edmunds was the one who stood by to explain the meaning of the Act.

Senator Edmunds said, when asked the meaning of the word "monopolizing":

> "'Monopolizing' has a meaning which indicates some attempt by the monopolist to impede competition, to prevent others from having an equal opportunity with himself to engage in the particular business sought to be monopolized."

And Senator Hoar said:

"The sole engrossing to a man's self by means which prevent others from engaging in fair competition with him"—such monopoly was punishable at common law.

You have both those definitions including the words "excluding others from carrying on their trade." Let us see whether it is necessary to carry out that construction.

In the first place, the second section is to be read in connection with the first section, and one to a certain extent illustrates the meaning of the other. The monopolizing clause is not one of the greatest importance in the Act, because in the first place it is not made applicable to territories; and in the next place because the punishment for the transportation of the product of the illegal combination by seizure of the property in course of transportation is not applied to it. The thing aimed at is the same whether it is applicable to an indi-

vidual or a corporation. It is prohibited to any person to monopolize or to attempt to monopolize. And the Act has in it its own dictionary, by which it expresses that the word "person" is meant to include "person or corporation"; and, therefore, whatever this monopolizing which is illegal is, it is something which is just as bad in the case of a person or of a corporation.

It is not the securing of a big part of the production which is forbidden by the Act. It may be ever so large. There is no word used in connection with largeness. But a word is used which, as in the first section, throws the greatest light upon the subject—to wit, the word "every" before "restraint." The words used here are, "*any* attempt to monopolize."

Necessarily if there is a statute which forbids the monopolization of *any* part of the trade, and if that means the securing of *any* part of competitive trade, you have excluded every person from making a transaction which will secure any part of the competitive trade. Any man who buys a piece of goods to that extent monopolizes some part of the trade. We, therefore, must, in dealing with that statute which forbids the attempt to monopolize any part of it, reach some construction which carries with it the idea of the word "exclusion"; because otherwise no competitor could purchase another, and there could be no consolidation of any sort.

That drives us back to the common-law definition. The common-law definition carries with it the idea of exclusion. It means to punish, and necessarily must mean to punish, an activity—as, for instance, the doing of something which is made illegal because it gives to the person who has property, by excluding others from the enjoyment of their property, an advantage which he otherwise

would not possess. Therefore, if he builds up his trade by rebates, or if in any way he monopolizes, or if in any way he interferes with others in the proper conduct of their trade—if he does any illegal act, for that he is punished.

The Remedy Applied Destroys the Object of the Act.

Then the remedy which is accorded, being the only one which can be applied, destroys the object accomplished by the Act. And therefore the failure to prescribe a remedy which does not induce such destruction is a demonstration of the lack of intent so to punish.

We have shown the effect of the relief granted by the Court below. The Act prescribes its punishment. It prescribes an indictment; it prescribes an injunction; it prescribes a three-fold damage. The Court has prescribed an additional punishment —to wit, the destruction of the value of the property.

If, therefore, when you come to apply the remedy, you find that the only remedy which you can apply is one that is necessarily destructive of the purpose of the Act, does it not require us to challenge the correctness of the interpretation by which that remedy alone could apply?

In these cases it is not the fact of the great combinations which menaces trade. It is the abuses which may be occasioned by them; and it is those abuses which are intended to be punished by the word "monopolizing."

These great combinations are necessary. They are the economic necessity of the age. By means of them the cost of production is cheapened. Prices, by reason of these great combinations, as in the present case, do not advance *pari passu* with the

advance of prices of the raw product. If they are punished where they interfere by monopolizing, by unlawfully excluding others from trade, you can do that; and that is not a work of destruction, but a work of supervision.

In this case, therefore, we have this situation of affairs presented: The Government makes a definition of the Act which leads to a remedy that is destructive of the purpose of the Act. It makes a definition of the Act which is not to be gathered from it. It makes a definition which restricts the application of the Act. And, therefore, we submit that all that is punished, and all that is meant to be punished, by this Act, is that sort of restraint of trade which is known to the common law; and that the monopolizing which is punished is the excluding of others from the use of their property by unlawful means.

Mr. Justice McKenna: Mr. Johnson, I have forgotten—have you on your first brief a reference to the debate from which you read in your argument?

Mr. Johnson: Yes; it is in one of the briefs.

Mr. Wickersham: You will find it in the printed argument of the Attorney-General.

Oral Argument of Junius Parker, Esq., January 11, 1911.

Mr. Parker: May it please your Honors, as stated by the Attorney-General, yesterday afternoon Mr. Johnson was prevented by a sudden, though, I am glad to say, slight and temporary indisposition, from completing his argument. I am not here to fill up the defendants' time, but Mr. Johnson not being able on that account to be present in court to-day has asked me, with the permission of the Court, to present for him to the Court the further views that he was thus unable to present. I am glad to be able to call to the Court's attention the fact that these defendants filed after the first argument of this case, last January, a stenographic report of Mr. Johnson's argument made at that time, and that the Court will find that argument still in the Record.

Now, if your Honors please, Professor Clark of Columbia, a distinguished writer on economics, has said:

> "There are three things which the people in their thought and speech jumble together, and even attack without any discrimination. They are, first, capital as such; secondly, centralization; and, thirdly, monopoly."

The confusion in the public mind which Professor Clark thus reprobates is altogether illustrated in the attitude of the Government, both in its brief and in the oral argument of the Assistant Attorney-General. They not only confuse effective and economical centralization of production with monopolizing, but they have confused the power that is inherent in all wealth with the power that monopolies exercise, and so "jumble together" simple capital and its use, and monopolizing.

This confusion of thought with respect to

monopolizing, it seems to us, has come largely from the indiscriminating use of the word "power." In some judicial utterances, as well as in books written by economic and social writers, monopoly has been condemned even before it has been abused, because of the power that thus existed for the exploitation and oppression of the public.

Now, the Government, taking hold of these expressions, argues in this case in effect this: "Let us admit that these defendants have not excluded or attempted to exclude others from the field of manufacturing and selling tobacco and its products; let us admit that their conduct has been as moderate and praiseworthy as they claim, or as the Court below found; admit this," they say, "and still they are to be condemned and forbidden longer to pursue business activities—because they have succeeded and are succeeding; because they have tremendous resources and capital compared with their competitors, and have the power to crush these competitors by the use of that capital and those resources."

Mr. Justice McKenna: Is that from their brief?

Mr. Parker: No; this is my construction of their contention. I think it is a fair construction.

The Chief Justice: You speak of capital.

Mr. Parker: I speak of capital as power.

The Chief Justice: Capital as power. Define what you mean by "capital."

Mr. Parker: I mean money; I mean wealth; I mean resources.

The Chief Justice: Now, let me ask you this question: Suppose a man had a hundred millions of dollars in money. He would be wealthy, having one hundred millions of dollars?

Mr. Parker: Yes, sir.

The Chief Justice: And suppose he would take that wealth and invest ten millions of it in A, ten millions of it in B, a different thing; ten millions of it in C, another thing; ten millions of it in another

thing; and so on until these investments had put him in a position where he controlled. Would you say that was the potentiality of money or the exercise of that potentiality?

Mr. Parker: I should say that, up to that point, it is the mere potentiality of money.

The Chief Justice: Of course that proposition, then, you must maintain in order to maintain the premise that you laid down in your argument when you started.

Mr. Parker: I maintain that that, so far as your Honor has stated it, is the mere potentiality of money—a potentiality that was inherent in the very money itself.

The Chief Justice: A man may have money in a strong-box; but I am putting to you a case where he has gone into that strong-box. He has taken the box out of the safe-deposit vault, where he had the money, the conserved power—what we may call the energy—and then he has gone out and put a portion of that energy here, and he has taken a portion of that energy and put it there, and has taken a portion of that energy and put it there, where the inevitable deduction and result of placing it in those things was to bring about a result wholly different and more effective upon the rights of parties than that which would have existed had the money remained in the strong-box. Your proposition is that that is mere power?

Mr. Parker: That is mere power, yet; because, if your Honor please (and your Honor's question strongly illustrates it), if it is a valid and sound argument that the mere possession of wealth and the power that that gives is to operate to keep men from commerce, then the rich man cannot go into commerce but at his peril; then the rich man must leave his money uninvested, or distribute it in such a way that he controls nothing. If your Honor please, perhaps (though I do not admit it) Con-

gress could forbid any man worth more than a given amount of money from engaging in interstate commerce, Congress, perhaps (though I do not admit it), might forbid a corporation with a larger capital than a fixed maximum engaging in trade between the States; but Congress has not done so. Not only has Congress not attempted to limit the wealth of those engaged in interstate trade, but there is no tendency on the part of the States in that direction. With respect to the formation of corporations, the power of the States is plenary, and only four States fix a maximum limit of capital stock for manufacturing corporations formed under their laws. Every other than these four States, including some whose anti-trust laws are most drastic, permit the incorporation and trading, and active trading, of companies of unlimited millions with all the power that that wealth gives.

Now, if your Honor please, what is the power that the courts and economists have condemned as an incident of monopolies, if it is not in its last analysis the simple and inherent power of accumulated and active capital? It is, in our judgment, the power to exploit and oppress the public that belongs to him who has excluded others from the trade, or for whose benefit others have been excluded from the trade, and who may treat the consuming public as he likes, without fear to him, and without hope to the public, of competition—actual or potential.

Mr. Justice McKenna: Will you repeat that?

Mr. Parker: According to our conception, the power that has been denounced as incidental to monopolies is the power to exploit and oppress the public that belongs to him who has excluded others from the trade or for whose benefit others have been excluded from the trade, and who, therefore, may treat the consuming public as he likes, without fear to him, and without hope to the public, of

competition—actual or potential. Is that what your Honor desired me to repeat?

Mr. Justice McKenna: Yes. Then the exclusion of others is your essential definition of that power?

Mr. Parker: Yes, sir; and the exclusion must follow, or the attempt to exclude must follow before that power is inherently bad.

The Chief Justice: You started out with your first proposition, and then you immediately diverted from that by discussing the question of the State, and power, and what the legislation has been. I was asking you as an abstraction. Now, I ask you the question, if a man has one hundred millions of dollars, and he takes that one hundred millions of dollars and invests it in various things having a relation to each other, or a connection with each other, in such a way that no common sense human mind can look at that situation without saying that by the act of this man, in taking his money out of his strong box and putting it here and there and there, that all human competition is impossible—does not that bring it right into the position of potentiality which you state in the proposition that you have just announced?

Mr. Parker: I think not, your Honor. I think, if your Honor means that those acquisitions have had the intent and effect of making competition impossible——

The Chief Justice: I certainly say that in my question. I say "have the effect."

Mr. Parker: Then, I still do not believe so. The case your Honor speaks of is not our case, and while that state of facts is not in this Record, I would say that it involves, to my mind, a disregard of constitutional requirements. I do not believe that Congress has jurisdiction over, and can make criminal the aims, purposes, intentions or effect of persons in the acquisition and control of

property which the States of their residence permit.

The Chief Justice: Pardon me. My question was not intended to raise any question of constitutional power. That is another thing. You started out by making an economic proposition.

Mr. Parker: Yes.

The Chief Justice: Whether a particular thing accomplishes a particular result; and you stated a theoretical proposition. My question addresses itself to that. Now, you immediately turn to an argument of constitutional power. That is another thing. I was not considering any question of constitutional power. That is further along.

Mr. Parker: Then I still answer, from an economic standpoint, that still, so far as you have stated it, it is potential.

Mr. Justice Holmes: Would not that depend more on what the subject-matter of the purchase was? If a man purchased the only mine there was of a certain material in the world you would, perhaps, admit that he had a monopoly.

Mr. Parker: Yes.

Mr. Justice Holmes: Wait a minute. But you would say that if he purchased simply all the tobacco in the world, but left it open to other people, there being opportunities and he not interfering with those opportunities of other people to raise more if they were so minded—you would say, yet, that the monopoly was not achieved?

Mr. Parker: I would say so; and the reason I did not say it, if I may be permitted to say so, was that I thought the Chief Justice's question put out of consideration the consideration of the facts in the particular matter. I conceive, of course, that if a person uses his money to acquire all of the possible supply of a raw material, or a product, so that competition is impossible, of course there is an economic monopoly.

The Chief Justice: Then your theoretical definition with which you started would be wrong?

Mr. Parker: You go further in the question put by Mr. Justice Holmes. You have made that the exclusion of others by the very act of purchase.

The Chief Justice: That is the very question that I put you.

Mr. Parker: Then, if it goes to that extent, if it takes the form of the question frequently presented, about the purchase of all the coal mines, then I will say that it is monopolistic, and against the spirit of all anti-trust law.

The Chief Justice: That is the very question I asked you.

Mr. Justice McKenna: That is, so long as there is no wrong exclusion of anybody else?

Mr. Parker: There is a wrong exclusion. There is the exclusion in the very purchase.

Mr. Justice McKenna: Not exclusion, of course, if somebody else could not buy it. A man could go out and buy all the coal mines in the world, giving the price that is demanded, without excluding anybody else or using any wrong toward anybody else. Do you call that monopoly?

Mr. Parker: I call it monopoly as an economic condition, and against the spirit of the anti-trust laws, not because the man has at the time all the trade in the commodity, but because of the nature of the commodity his very purchase has excluded others. If we are to discuss questions of law and constitutional authority, I conceive that very different considerations apply; but so far as economic conditions are concerned, a man who, by his purchase, considering the nature of the commodity, excludes the possibility of competition, violates the spirit of the anti-trust laws, and violates the economic law against monopoly.

Now, if your Honors please, this Record shows no purchase of a monopolistic kind. This Record

shows no purchase having the effect, intent or purpose to exclude others. Therefore I say that in this case there is left out of the equation the consideration mentioned by the Chief Justice, and we have here simply the power that is inherent in any wealthy man or corporation engaged in the tobacco business.

Now, it seems to me that the difference between this power that I have mentioned as residing in the monopolies, the power to exploit the public, resulting from the fact that he has no fear and the public no hope of competition, is a very different thing from the power that these defendants have in the tobacco business. The fact, if your Honors please, that the possession of large wealth and the use of large wealth in business, brings the power and temptation to violate the law against monopolizing, brings the temptation and power to exclude others from the trade, may some time hereafter be an argument to the legislator who favors the law to limit the capital of a corporation or the wealth of an individual engaged in trade. In just the same way, the fact that carrying deadly weapons gave the power, and sometimes brought the temptation to commit murder, undoubtedly influenced the legislators to enact statutes forbidding the carrying of concealed weapons. Before the passage of such statute, though, it seems to me one would not be taken as serious who contended that because the possession of a deadly weapon gave power to commit murder such possession constituted itself the crime of murder, or any other crime.

Now, if your Honors please, we, representing the main defendant, have a conception of the meaning and effect of the Sherman anti-trust law that does not seem to us either startling or ingenious. Taking the statute as it is written, and taking the decisions of this Court as its only authoritative com-

mentary, this is our conception of the Sherman law. We conceive that the meaning and effect of the statute is to preserve to everyone opportunity and liberty to engage in interstate trade—to preserve such opportunity and liberty against the voluntary covenant or quasi-covenant of the trader, as well as against the improper conduct of other persons. In our conception that is the whole law.

The first section, in so far as it forbids contracts and combinations in restraint of trade, forbids any sort of arrangement whether it be by actual covenant or other combination or device between independent traders, whereby they directly or indirectly agree to limit their activity in interstate trading, or where the result of the arrangement is to take away the incentive to such activity in interstate trade. We conceive that under the first section, or the second section, it is as much against the law for two insignificant interstate traders to agree, or to come together by any other combination or device to suppress the liberty of trading which they had before, as if the agreement constituted ninety per cent. of the trade.

The first section, as we conceive, in forbidding the entering into a conspiracy in restraint of interstate trade protects the trader against outside interference. The crime of conspiracy in restraint of trade undoubtedly has its typical instance in the Danbury Hat case, where the interference was by those themselves not engaged in interstate trade at all. The second section, when it forbids the monopolizing or attempting to monopolize any part of interstate trade, forbids the excluding or attempting to exclude others from interstate trade. In our judgment, in order to violate this section, the exclusion, or the attempt to exclude, must be by means at least tortious, either at common law or by some other statute, in order to save this sec-

ond section from absolute invalidity on account of vagueness and uncertainty of meaning, as well as to prevent the statute from destroying the very competition it was intended to foster.

The Chief Justice: Will you read that again? I see you are following notes.

Mr. Parker: Which part do you mean?

The Chief Justice: That last proposition.

Mr. Parker: The second section, according to our conception, forbids the exclusion or the attempt to exclude others from interstate trade.

The Chief Justice: That is, monopolizing.

Mr. Parker: In our judgment, in order to violate this second section the exclusion or attempt to exclude must be by means at least tortious, whether criminal or not, either by common law or statute other than the Sherman law, in order to save this second section from absolute invalidity on account of vagueness and uncertainty of meaning.

Mr. Justice Holmes: Do you not take your contention too far there? It would not be tortious at common law for an immense concern to lower the prices for the purpose of driving another man out of business in the same community. Might not that very well be within the monopoly clause of the Sherman law?

Mr. Parker: I think it might very well be; I think it might most desirably be; but it is not there; and many authorities there are which hold that the lowering of prices with a purpose to drive out a competitor, is simply competition. Personally I am delighted that this record is lacking in evidence of such practices. But I do not conceive that the ordinary means of competition commended by the comomn law are prevented by the second section of the Sherman anti-trust law, because what measure are we to have as to the propriety of the competitive methods? If it is to forbid competition and at the same time foster competition, who is to

draw the line between weak, ineffective, non-injurious competition, and the severity of competition?

Mr. Justice McKenna: Will you give an illustration, if you can do so without diverting from your argument, of what you consider tortious?

Mr. Parker: Yes, sir. I conceive, if your Honors please, that a typical case of monopolizing under this second section is the attempt to corner all of the raw material, gone into for the purpose of or having the effect of thus excluding others.

Mr. Justice Hughes: Do you mean by that the mere purchase of all the raw material?

Mr. Parker: No, sir; I mean to say that when you come to this second section, in any attempt to monopolize, intent is an element; and it is the only section in which intent is an element. I think when a trader sets out with the intent to exclude a competitor by purchasing all the raw material, that there is an exclusion by engrossing, and engrossing is illegal at common law. Moreover, your Honors, I think any of the methods condemned by the common law, fraud, deceit, coercion, are violative of this second section. I believe, moreover—and it may be said more certainly than in the illustration given by Mr. Justice Holmes—I believe that a control of all of the avenues of distribution and the exercise of that control to exclude the product of competitors, is violative of this second section. I believe that the attempt to exclude competitors from means of distribution by securing illegal rates from common carriers, and the securing them, violating the Interstate Commerce Act, is violative of the second section of the Act. I believe that the dozen and one ways that, at common law or by other statute, are denounced as criminal or tortious, being resorted to for the purpose of excluding others, constitute an attempt to monopolize under the second section of this law.

Mr. Justice Lurton: It is your contention, then,

that there must be an intent manifested in some way, to constitute a monopoly under this section?

Mr. Parker: Pardon me?

Mr. Justice Lurton: That there must be an intent to exclude others made out in some way, to constitute monopoly?

Mr. Parker: I think there must be an intent as a precedent to an attempt; because I cannot conceive of an unconscious attempt; but I believe that if the effect of an illegal act is to exclude others from trade then, as in other crimes, intent will be presumed.

Mr. Justice Lurton: As a necessary result?

Mr. Parker: Yes, sir. It must be by illegal means, under any circumstances.

Mr. Justice Lurton: You do not mean that the acquisition must be by illegal means?

Mr. Parker: No, sir; I do not;[1] but I mean that his engrossing being itself illegal is illegal means under the second section, not because the acquisitor has all the trade at a given moment, but because from the nature of the matter and from the intent with which he acts, he has thereby excluded others from the trade.

The Chief Justice: I am going to give you an illustration that runs in my mind. I recollect once being present at a very acute discussion of the 16 to 1 question in the coinage of silver—the question of supply and demand. The question of supply and demand was largely discussed, and one of the gentlemen, in the discussion, said that the situation re-

[1]This answer presumed the word "acquisition" in the question meant engrossing, the cornering of the raw material, the only kind of acquisition mentioned. We cannot conceive that the acquisition of competing businesses (or their consolidation) to any extent is an attempt to monopolize, whatever the intent, because it leaves the field free to others. It is just this difference in the result that makes engrossing illegal and the other acquisitions favored at common law.

sulted in this: From the potentiality which arises from the fact that in every silver mine in the world there is a vast amount of ore which has been worked with the appliances which then existed, as he then described them, and it stands there now looking every man in the face in the whole world; that with the present means of extracting ore, that vast body of ore can be worked at a profit at such a price that at any moment when the price goes up that ore instead of being dormant will flow into the channels of money, and therefore it keeps the price down. Now, I put that by way of illustration. It seems to me that your statements have departed from your first proposition, but I will not discuss that. If a man, having vast sums of money, has so distributed that money by investment, so that the whole world may know it, as to absolutely exert the potentiality of excluding everybody else, and with the certainty to everybody else that he will be destroyed if he takes a step—would that be a monopoly in your definition of the word "monopoly," as you laid it down at the start?

Mr. Parker: Does your Honor's question call for an answer on the economic phase?

The Chief Justice: No; I mean under this law.

Mr. Parker: Under this law? No, your Honor.

The Chief Justice: You say no. Why? This Court held in the Northern Securities case that a situation infinitely less acute than that was a monopoly under this law.

Mr. Parker: I think that the Court in the Northern Securities case, or that a majority of this Court, conceived that there was no purchase at all in the Northern Securities case, but a mere custodianship created. I think that the point of sharp division in this Court was whether there was an actual investment by the Northern Securities Company or whether there was a mere custodianship

created as a part of a scheme for eliminating competition between those two roads.

The Chief Justice: Then your answer is that the question whether or not it creates a monopoly depends upon a matter of form, and not a matter of substance?

Mr. Parker: No, if your Honor please. Indeed, I trust I am not to be put in the position of trying to reconcile the conflicting views discussed in the Northern Securities case; but the Northern Securities decision was based upon the fact that there was, in fact, no investment, and that there was a mere custodianship created; and that the holding company was the mere corporate synonym of the old-fashioned trust, and that the stock certificates, so-called, were in essential respects, the old trustees certificates; and we conceive that in that way it was only a scheme. But your Honor has put to me a case where there has been an actual investment. I gathered from your Honor's question that actual investment only brought power to exclude others. In that condition, I say it is not violative of the second section of the Sherman law.

Mr. Justice McKenna: In other words, it is not power possessed, but power exercised.

Mr. Parker: It is the exercise of the power; it is the doing of the illegal thing or attempting to do it.

Now, if your Honors please, we conceive that this interpretation of the law keeps it from being radical or revolutionary, and makes it a development of, instead of a departure from, the orderly growth of economic legislation. It becomes an application to interstate commerce of the doctrine of the common law. Whether offenses against the Sherman law were criminal at common law or not, no contract, in our conception, or arrangement or conduct, has been condemned by this Court as

against the Sherman Act, which would have been favored at common law; no contract or quasi-contract has been condemned that would have been enforcible at common law.

We contend, then, that the Sherman law applies to interstate trade, and to contracts, arrangements and conduct directly affecting interstate trade, the principles of the common law—making criminal and subject to Federal prosecution—if direct in their effect on interstate trade—some things that were criminal at common law, and some things that were forbidden at common law only in the sense that contracts for the doing of them were unenforcible; giving to Federal Courts jurisdiction in equity to prevent the things from being done which if done would be criminal; and giving an easy and tempting action at law to those who are injured by these things.

Surely a statute which applies to interstate trade only the principles of the common law, already applicable to all intrastate or local trade, and for centuries believed sufficient to protect such trade against noxious combinations or restraints, ought not to be called radical or revolutionary.

Nor do we conceive that this conception of the law makes it insignificant. The statute has its origin not in any supposed inefficiency of the common law, but because it was doubtful whether these principles extended to interstate trade and there are no federal common law crimes; and, if your Honors please, almost all vital and well-considered statutes have their principal utility in the application of effective remedies to common law wrongs.

In our view there is no decision of this Court inconsistent with our conception of the common law; but under this law there have been decisions of this Court which prevented competing railway companies from agreeing upon rates to be charged

by them. There is the decision in the Northern Securities case, which prevented the elimination of competition between railway companies by a scheme of their respective stockholders entered into for the purpose of eliminating that competition. There was a decision which prevented an agreement among the manufacturers of iron pipes that their competition should be only ostensible and not real. There has been a decision which gave to the purchaser who had paid an excessive price for his iron pipes treble the damages that he recovered. There have been decisions which prevented men from conspiring with other men in their interstate trade, whether these other men belonged to labor unions or were competitors.

It seems to me that having achieved such salutary effects the law cannot be called insignificant.

Of course, if your Honors please, with respect to this, if this is the proper conception, the Knight case was correctly decided. There, there was a mere purchase of property, with not even the covenants not to re-engage in business given by the vendors, such as are usual in such transactions; and the Government is not yet ready to say that the mere acquisition of property is violative of this law.

The Trans-Missouri case, the Addyston Pipe and Foundry case, and the Swift case are all typical instances of contracts or quasi-contracts restraining competition among competing concerns.

The Northern Securities case, as I said before, as conceived by a majority in this Court, dealt with the fact that there was no real investment, but a mere scheme to eliminate competition between these roads. If the Northern Securities case had arisen at common law, in a suit at equity for specific performance of the contract of delivery by the stockholder, it would have been declared against the

policy of the common law under the conception of facts held by a majority of this Court.

So we contend that the preservation of the liberty and opportunity of trading, the preservation of the principles of the common law, and the provision of a remedy adequate for the violation of the principles of the common law was the purpose of this statute.

If your Honors please, if this conception is right, it seems to me that we come down to a very few questions:

First, have these defendants in combination with others, or acting alone, excluded others from the trade? To that question the Court below answers impressively and expressly, no; and it does seem to me, if that is wrong, that it is the part of the Government to lay its hand on such conduct as, being continued, will exclude others, and ask for an injunction against the continuance or repetition of those practices.

Have we entered into any contracts limiting anybody's freedom in trade? The only things that I can conceive of are the covenants taken from the vendors; and we say and argue with absolute confidence that every one was taken by a vendee company in reasonable protection of the good-will conveyed. If there are any that are unreasonable on this basis, it was the part of the Government to call attention to those covenants. The Court found none.

Has there been in the intercorporate relations of these defendants such a condition shown as eliminates all incentive to activity in interstate trade?

Now, if your Honors please, it seems to me that this brings us to a consideration of the holding company, as discussed in the Northern Securities case. Bowing, of course, cheerfully to the decision

of the majority of this Court in the Northern Securities case, it seems to me that the effect of that decision is to say that the holding company, in railroad matters at least, violates the law, and is, as I have said, the mere synonym, in corporate form, of the old-fashioned trust.

Assuming, but only for the sake of the argument, that the holding company in industrial affairs is thus condemned, it seems to me that you must go for your definition of a holding company to the decision in the Northern Securities case; and it seems to me that that definition is about this: It is where a company issues, as a part of a general scheme, its own shares in exchange for the shares of competing companies, thereby eliminating any incentive for activity on the part of the independent companies, and substituting only their interest in a mere holding company.

If your Honors please, if this is applied to this Record, there is no holding company developed. In the first place, every one of these principal defendants is largely an operating company.

In the second place, I should say that with respect to most of these companies, there is no natural competition at all. The American Tobacco Company is enjoined from voting the stock that it holds in the Mengel Box Company, the company manufacturing the boxes. What theory of the Northern Securities case is violated by that holding of stock and voting it? No trade activity is limited; and even if competition is the key-note of the Sherman law, there never would be competition between a box manufacturer and a tobacco manufacturer. Yet the great majority of the companies whom the main defendants are enjoined to continue in control of are not competing companies at all, but only related or non-competing companies.

With respect to competing companies, there is no scheme developed. Every concern in which any of these main defendants hold stock, but one, was acquired as to its stock, for cash or its equivalent; the P. Lorillard Company stands alone as the only company whose stock, held by any of these main defendants, was acquired by the issuance of stock of the owning company or any predecessor.

Now, if your Honors please, there has been a multitude of briefs, oral arguments and supplementary briefs filed in this case. I am requested by Mr. Johnson to say to the Court that the ideas which I have so inadequately presented are amplified in a supplemental brief filed a few days before the arguments began, bearing the signature of Mr. Johnson and associate counsel, and I ask the Court's special attention to it.

I desire only to say a word more, and that is induced by questions that were asked by the Chief Justice and Mr. Justice Lurton in connection with the leaf tobacco situation.

Mr. Justice Lurton asked Mr. Nicoll if there was anything in this case in regard to night riders, farmers' organizations, etc., in the black tobacco belt in Tennessee and Kentucky. Mr. Nicoll correctly told him that there was none; but I think it may be interesting to this Court to know the fact, and it is a fact shown by this Record, that the crop raised in 1903 in the black tobacco belt with respect to which Mr. Justice Lurton asked, is about 180,000,000 pounds, and that these defendants, in the aggregate, never bought but 27,000,000 pounds (Vol. V, Ex. 76, "Dark Western, including Hend. Dist."). The fact is, as shown by this Record, that almost all of that tobacco is bought by the Regie buyers—the Government monopoly buyers—of Italy, Austria, France and Spain; and there is not

a word of testimony in this Record, nor even is there an allegation in the bill that alleges, that there is, or ever has existed, any combination or concert of action, or any relation between the American Tobacco Company and its buyers and the buyers of these Government monopolies. Moreover——

The Chief Justice: Will you give me those figures again?

Mr. Parker: 184,000,000 pounds, against 27,000,000 pounds.

Moreover, if your Honors please, there is not in this Record anywhere one word of testimony showing the existence of any organization of farmers, the producers of leaf tobacco, except a letter written by the President of the American Tobacco Company to the President of the Burley Tobacco Association —the growers—in 1903.

Reference has been made by a member of the Court to the frequent references that have been made by counsel to Mr. Duke's testimony; the fact is that Mr. Duke is the only witness who gives a consecutive statement of the growth and development of this Company, and his testimony is not contradicted. Mr. Duke puts into this Record a letter (Vol. IV, p. 432) which he wrote to the Burley Tobacco Society growers' president in 1903, and testifies without contradiction that it correctly and accurately states the attitude of the American Tobacco Company toward the farmers and their organizations. Let me read one or two paragraphs to you. I commend the whole letter to your Honors for your consideration:

> "Now, as I understand, it is proposed that an association, embracing a great number of the producers of burley tobacco, shall be formed, which association shall have a corporate form, and which association is to be a

middleman between the producers who form it and ourselves; so that hereafter, instead of our purchasing the tobacco we need direct from the farmers, we are to purchase it from this association, or corporation. So far, we have no objection to the plan, and have no right to object. If the farmers deem it to their interest to associate themselves into an organization, of whatever sort, it would be entirely satisfactory to us to deal with such organization as freely and under the same conditions as we would deal with any other person or corporation which had tobacco we desired to acquire; and we would desire that relations as frank and cordial should exist between us and that organization as we now desire between ourselves and the farmers themselves."

Mr. Justice Holmes: What are you reading?

Mr. Parker: I am reading, as the only evidence in this Record of the existence of the organization of the farmers, a letter written by the President of the American Tobacco Company to the President of the Burley Tobacco Society, in 1903.

If your Honors please, I do not desire to read further from that letter, but I do earnestly commend it to your Honors' attention, as stating truly, accurately and fairly the relations of this company to the producers of tobacco.

The Chief Justice asked a question that I desire to answer. He asked whether the market quotations that are in evidence did not show the market from day to day, and if it were not, therefore, possible that the defendants acquired their tobacco when the market was low, and that the "high water" points were only nominal, not helping the farmers, and not hurting the Tobacco Company.

The Chief Justice: I asked that because I wanted to find out whether counsel might not be in error.

Mr. Parker: But the evidence in this Record is not the evidence of the market quotations. It is the evidence of what these defendants paid to the farmers; and this evidence shows, without any contradiction, that every grade of leaf tobacco of which these defendants are substantial purchasers, has advanced in value—some grades more than others, and some grades less than others—but there has been generally an almost constant advance of the price paid by the American Tobacco Company to the farmers; and there is not a syllable of proof that any farmer or any member of an organization of farmers even disbelieves that.

Mr. Justice Holmes: Is there any comparison of that increase in values with the general increase of the prices of other things?

Mr. Parker: No, sir; there are no such tables in this Record. The testimony with respect to the increase in the value of tobacco came from time to time into the Record as the men in charge of buying a particular grade were on the stand. For instance, the manager of our southern leaf department testifies with respect to the prices in Virginia, North Carolina and South Carolina, and that there have been advances in some grades to the extent of 100 per cent. (Vol. II, p. 126). There is the testimony of our western leaf buyer, with respect to the burley. He testifies that it increased in a few years from seven to eleven cents (Vol. II, p. 184). There is the testimony of the buyer of the Snuff Company, which company is the only one of these defendants that buys tobacco in the black tobacco belt at all, which shows that year by year the average cost to the Snuff Company has increased (Vol. III, pp. 228-9). There is the testimony of Mr. Carlton, the buyer of the Imperial Tobacco Company, as to their increase in prices (Vol. IV, pp. 266-270).

So that you have not in this Record tables of the market quotations, but you have the actual testimony of the cost to these defendants; and it is without qualification, without modification, without contention on the part of the Government so far as I have ever heard, that there has been an advance in every grade of leaf which these defendants use.

We did not go into the cigar leaf. Neither the Government nor ourselves thought that we cut sufficient figure in the cigar leaf trade, making only fourteen per cent. of the cigars, as to make that valuable; and I do not know what fluctuation there has been in that respect.

Recess.

Mr. Parker: If your Honors please: It has been stated in response to the question of Mr. Justice Lurton, that the counsel representing the American Tobacco Company and the other main defendants, represent also the British-American Tobacco Company. We do not disagree in any way with the counsel for the Imperial Tobacco Company in the conception that these contracts of 1902 are valid. But there is a consideration that I desire to express to the Court just as briefly as I can.

I conceive that contracts that only divide up territory are illegal; and I conceive, moreover, that these contracts contain covenants in restraint of trade. But the situation, as it seems to me, must be taken fully into account. The American Tobacco Company had a large and valuable and growing business in England, with vast property for which it paid several million dollars, and to which it had added several million dollars more. It had brands in England that had achieved great popu-

larity, until their consumption was to some extent diminished by the increasing differential between leaf tobacco on the one hand and manufactured goods on the other. It sold to the Imperial Tobacco Company these vast properties. Surely its covenant not to engage in business stands exactly as valid under the rulings of this Court as one of those contracts valid at common law, not invalidated by the Sherman Anti-Trust Law—the contract of a vendor in reasonable protection of the property and good-will conveyed.

I quite agree, if your Honors please, with the suggestion that the Imperial Tobacco Company, up to the time it entered into that contract, had full power to come to America and to establish factories and to compete with the American Tobacco Company in America just as the American Tobacco Company had with the Imperial Tobacco Company in Great Britain. So the American Tobacco Company, considered as a vendor, had a right to require a covenant from the Imperial Tobacco Company that the property it was conveying should not be used in competition with the business retained by it. In the very illuminating opinion by Circuit Judge Taft in the Addyston Pipe and Foundry case, that is mentioned as one of the five classes where contracts in restrain of trade were valid at common law and are valid under the Sherman law. It is the contract taken by a vendor from a vendee, when the vendor retains a large property, that the property conveyed to the vendee shall not be used in competition with the property of which the vendor retains possession.

Mr. Justice Lurton: That is, the restraints are not unreasonably wide?

Mr. Parker: That is the contention, if your

Honor please. I am leaving out of account, now, the fact that the Imperial Tobacco Company, with a comparatively small business, yet had brands of tremendous potentiality and popularity in America, which it conveyed to the American Tobacco Company. So I say that the covenant of the American Tobacco Company to the vendee is the ordinary covenant given by a vendor for the reasonable protection of the good-will conveyed.

Mr. Justice Lurton: Is it limited to the use of those brands?

Mr. Parker: No, sir; it is not. It is a covenant not to engage in business. But, if your Honor pleases, I do not conceive that any of the covenants not to re-engage in business given by a vendor upon the conveyance of good-will and property is limited to the particular property conveyed. I do not understand that in the case of Cincinnati Packet Company *vs.* Bay, there was a limitation that they should not use the boats conveyed. Indeed, I gather that there the main thing conveyed was the competition. So, as I say, the American Tobacco Company's covenant to the Imperial is justified on the ordinary and valid grounds of being a reasonable contract by the vendor to protect the vendee in the enjoyment of the property and good-will conveyed. I say that the covenant by the Imperial Tobacco Company not to come to America is sustainable on two grounds: First, there was a property conveyed by the Imperial Tobacco Company. In the second place, if there had not been, the Imperial was the vendee of a property; and the American Tobacco Company, as the vendor, had the right to require a covenant to protect what it retained.

What did they do? They united in the organ-

ization of the British-American Tobacco Company, and both companies transferred and conveyed to the British-American Tobacco Company immense properties, an immense business, and brands and good-will of immense value. I see nothing illegal in that. If two men can meet and go into a partnership, and put into it the whole of their businesses and property without violation of law, then two men or two corporations have a right to form a corporation and to convey to it part of their businesses and good-will and property.

Here were properties, not stocks, conveyed, of the value of millions of dollars; and these two companies as vendors executed covenants with the British-American Tobacco Company—the ordinary covenants to protect the property and good-will conveyed. There was not a contract; there was a sale, accompanied by the ordinary contracts in restraint of trade, but in reasonable and valid restraint of trade.

Oral Argument of Sol. M. Stroock on behalf of United Cigar Stores Company, January 11, 1911.

Mr. Stroock: If your Honors please: the United Cigar Stores Company comes before this Court as an appellee. The petition of the Government in this case, so far as the United Cigar Stores Company is concerned, was dismissed by the unanimous judgment of the judges of the Circuit Court.

Organization.

George J. Whelan and his brothers, commencing in 1883, became engaged in carrying on the business of retail tobacconists in a number of cities in New York State. They were successful. In the spring of 1901, Whelan came to New York City determined to go into the business of conducting a large number of retail cigar stores throughout the United States. With this end in view he caused the United Cigar Stores Company to be incorporated. Not having sufficient capital of his own to carry on the enterprise along the lines which he thought necessary, he went to every tobacco manufacturer, cigar manufacturer, leaf tobacco dealer and jobber whom he knew and laid his proposition before them. As the Record shows, he made to all of them flattering offers, but every one declined to take any interest in his enterprise.

Among the people to whom he submitted his proposition were some of the officers of The American Tobacco Company, but they, like all the others, turned the proposition down and refused to have anything to do with it.

Whelan and his associates thereupon went ahead on their own account. Their initial investment in the enterprise was $2,500. But that is not all; for by November, 1901, they had invested $50,000

of their own money, and had succeeded in making $2,000 upon their investment.

During the months that elapsed between the organization of the United Cigar Stores Company and November, 1901, Whelan, being convinced of the ultimate success of his enterprise, persistently kept at the officers of The American Tobacco Company, trying to induce them to invest. Finally, in November, 1901, he succeeded in convincing Mr. Duke and Mr. Hill that his enterprise could be made successful, and he then induced them, not to buy him out, but to invest $50,000 in the enterprise. So that the United Cigar Stores Company then had a capital of $100,000.

The Record shows that neither then nor at any other time was any contract entered into between the two companies. No agreement was had as to pushing the goods of The American Tobacco Company or hindering the sale of the goods of independents. Whelan had represented that the retail business as a business could be made to be profitable; and the Record shows that the investment of the American Tobacco Company was made with but one end in view, and that was to make money upon its investment.

For the next year or two the capital investment was not increased. But at the end of that time, Whelan, through his business ability, having demonstrated that the enterprise could be made successful, it was decided to increase the capital stock. Bonds and preferred stock were issued. Whelan and his associates were afforded the opportunity to buy one-half of the preferred stock and one-half of the bonds; but as they had charge of the enterprise, actively conducting it, they preferred to invest their moneys in the common stock, from which source the largest share of the profits was to be ceived. There was issued in all $750,000 of preferred stock, all of which was bought by the Amer-

ican Tobacco Company, and $900,000 in common stock. In this common stock Whelan and his brothers and their associates invested their entire fortunes, amounting to $300,000; the American Tobacco Company taking the balance of $600,000.

I do not understand it to be seriously urged that the investment by the American Tobacco Company in the bonds and stocks of the United Cigar Stores Company in any sense offended the Sherman Act. The American Tobacco Company and the United Cigar Stores Company were not and could not be competitors. The former manufactures and sells tobacco products at wholesale. The latter sells tobacco products at retail only over its own counters.

Government Charges.

But the Government charges that having acquired that interest, the American Tobacco Company made use of the United Cigar Stores Company as an instrument for three purposes:

First, to injure and cripple other manufacturers, and to prevent them from distributing their products.

Second, to injure and drive out of business jobbers in tobacco products.

And third, to injure, cripple, and drive out of business other retailers, and to attempt to monopolize the retail trade in tobacco products.

Conclusions of the Circuit Court.

Judge Coxe, in the Court below, exhaustively wrote the story of the United Cigar Stores Company in the opinion which is in the Record (Vol. I, pp. 302-3). He found that neither in its organization nor in its operations was there anything offensive to the Sherman Act committed or attempted. In this opinion all four of the judges below concurred. They found that not only should

no injunction be issued against this defendant, but also that there was nothing in the Record to justify the granting of an injunction against the American Tobacco Company to restrain it from controlling this defendant, nor from interfering with it in its development, because there was no evidence of such control or interference.

Conduct Toward Manufacturers and Distributors.

Of course the United Cigar Stores Company has promoted the sale of the products of the American Tobacco Company. But this has not been the result of any contract, agreement or understanding. The tobacco business, as the Court has been told, is a business of brands. In different parts of the country different brands are in demand, different kinds and qualities of tobacco, different sizes of cigars. The taste of the community in different parts of the country and even in different sections of the same city differs materially. What the public wants in New England is a drug on the market in Texas. The taste of the public must be catered to. The consumer is the boss of the tobacco business, because tobacco is a luxury; and any concern that attempts to foist upon any community a kind of tobacco or a kind of cigars that that community does not demand, must inevitably go into bankruptcy.

Every manufacturer who was called as a witness in this case testified to that fact; and nothing in the Record is more firmly established.

Accordingly, this Company has promoted the sale not only of the goods of the American Tobacco Company, but of the goods manufactured by independent dealers everywhere—whatever the public taste in each locality demanded. Not one manufacturer called by the Government testified that this defendant refused to handle his goods, or to treat them fairly, or that it hindered him in any way

whatsoever. Not a single jobber called by the Government testified that this defendant refused to deal with him, or, in dealing with him, had refused to treat his goods fairly. There is not a line in the Record which even inferentially supports such a charge.

But the Assistant Attorney-General now says: "It is true that you do handle independent goods, but you do that because you think it wise to get the profit and hold the customer." Of course that is true. Few men go into the tobacco business or into any other business for the pleasure of the thing. Their primary purpose is to make money; and they handle the goods that the public wants, in order that they may make money.

Because a large percentage of the stores of the United Cigar Stores Company (viz.: 163 out of a total of 409) are located in New York City, and because, therefore, such a large percentage of the total volume of its business is in New York City, Mr. Hillman, an independent jobber of New York City, was called by the Government as a witness. He testified that he would not handle or deal in the goods manufactured by the American Tobacco Company and its associates—not because they would not sell their goods to him, but because he refused to handle their products, preferring to handle only goods manufactured by independent manufacturers. And then he testified, at Volume 3, page 499:

> "Q. Is the United Cigar Stores Company a customer of yours?
>
> "A. It can be so considered, yes; I think we sell them goods.
>
> "Q. Well, extensively, do you not?
>
> "A. Rather, yes, yes.
>
> "Q. These various goods that you have enumerated, the different brands of cigarettes and smoking tobaccos, quantities of

them are purchased from you by the United Cigar Stores Company?

"A. With a few exceptions, with a few goods—in a few cases they buy generally from us."

Mr. Hillman further testified (pp. 500, 602) that the United Cigar Stores Company purchased on credit from him between $60,000 and $70,000 worth of merchandise in each year, and that this did not include the purchases made by that company from him for spot cash, of which he kept no record; that the largest amount of business which his concern ever did in any one year was $325,000; so that this company alone purchased twenty-five per cent. of his total output.

Mr. Whelan, the president of the United Cigar Stores Company, was called by the Government as a witness. Of course his testimony is that of an interested witness, but it is absolutely uncontradicted. And this is what he testified to at Volume 3, page 115 of the Record:

"No one ever told me what goods to buy. Mr. Duke always told me to buy wherever I could buy the cheapest.

"Q. To buy your goods anywheres?

"A. Wherever we could buy the cheapest.

"Q. What have you done?

"A. That has been our action.

"Q. You handle the goods manufactured by other manufacturers in your stores?

"A. We sell everyone's goods that has a demand.

* * * *

"Q. Now as far as pushing the goods of manufacturers other than the American Tobacco Co. and its allied companies, have the sales of the other manufacturers increased in your stores?

"A. Well, such goods as increased generally with other people showed a greater increase in our stores than they did in outside people's stores."

Both of the members of the firm of Schinasi Brothers, large independent cigarette manufacturers, were called as witnesses, not by the Government but by the American Tobacco Company. Solomon Schinasi testified, at Volume 4, page 665:

> "Q. Is the United Cigar Stores Co. a large customer of yours?
>
> "A. Next to the Metropolitan comes the United Cigar Stores as a retailer, certainly.
>
> * * * * * * *
>
> "Q. Have you had any reason to complaint, Mr. Schinasi, that the Metropolitan or the United Cigar Stores were treating your goods unfairly?
>
> "A. No. We never find out anything like that.
>
> "Q. The truth of the matter is retailers have to handle what the consumers call for, do they not?
>
> "A. I think so."

How can it be said that this company has been used to cripple other manufacturers and distributors of tobacco with a view of driving them out, destroying competition, and preventing others from entering, when the Record shows affirmatively that the United Cigar Stores Company is and always has been a large distributor of the goods manufactured and dealt in by concerns in no way connected with the American Tobacco Company?

Mr. Justice Holmes: Do the United Cigar Stores Company's stores sell domestic cigars as well as imported Havana cigars?

Mr. Stroock: Certainly, sir.

Mr. Justice Holmes: I did not remember as to that.

Mr. Stroock: Certainly.

Conduct Toward Retailers.

We now come to the consideration of the third branch of this case; and that is the charge that this

Company has been used by the American Tobacco Company as an instrument to acquire a monopoly of the retail trade in tobacco products, to drive out of business other retailers, and to prevent others from entering the field. That is the charge.

Again we respectfully call the attention of the Court to the unanimous opinion of the Court below, to the effect that such charge is not only entirely without foundation and without any evidence whatsoever to sustain it, but the Record abounds with evidence showing quite the contrary. And I will read you a brief extract from the opinion of Judge Coxe on that point. It is found in Volume 1 of the Record, page 303-4:

> "The proof fails to establish unfair or unlawful methods in acquiring and conducting the business of the Cigar Stores * * * No special privileges are accorded by the Tobacco Company to the Cigar Stores Company over other purchasers. Their business is conducted in their own way, without dictation from the Tobacco Company."

The Assistant Attorney-General in his argument said:

> "Through the United Cigar Stores Company they are, one by one, displacing all the important cigar retailers throughout the important cities of the United States. The thing has grown almost like Jonah's gourd."

The Record shows that there are 600,000 places in the United States in which tobacco products are sold at retail. Of these, the United Cigar Stores Company owns and operates 409. It is significant that of all the 599,591 retailers in the United States, in no way connected with any of the defendants, not one testified that any unfair competition had been indulged in by this Company, or that, either alone or in combination with the other defendants, it had injured him in any way in his business.

One retailer was called. But before we examine his testimony, attention is called to certain pertinent facts shown by the Record. They are these:

1. That in New York City, where 163 stores of the United Cigar Stores Company are located, there are to-day more retailers actively engaged in business than there were before the United Cigar Stores Company came into the field.

2. Including the stores operated by its sub-companies, this company operates 409 out of 600,000 cigar stores and stands. So that during the time that it has been in business, and after the exercise of these tremendous influences with which it has been charged, it has managed to acquire one-sixth of one per cent. of the total number of cigar stores in the United States.

"But," says the Assistant Atorney-General, "it is true that the number of its stores is insignificant compared with the whole; but look at the volume of its sales! They are enormous."

Let us assume, for the purpose of argument, that a corporation or individual which succeeded in building up a large business—so large, indeed, that the volume of its sales is a large percentage of the total business—in some way offends the provisions of the Sherman Act. If we examine the Record in this case, we find that the percentage of the retail business in the United States carried on by this Company is small indeed. According to the best computation available (see Main Brief of The American Tobacco Company, page 140), we find from the Record that in the year 1906 the total amount of the sales at retail of tobacco products in the United States, manufactured and produced by cigar and tobacco manufacturers (including not only the defendants but all manufacturers generally), was $565,000,000. The sales at retail by the

United Cigar Stores Company during the year 1907, were, at the time of the taking of the testimony in November, 1907, estimated to be $15,000,000. So that during the year 1907 the business of the United Cigar Stores Company amounted to about three per cent. of the whole retail business in tobacco products.

Based upon these figures, and assuming that the sales of tobacco will continue to be stationary, that every other retailer in the United States will be gradually driven out of business, and that the United Cigar Stores Company will alone remain, it will take about three centuries, if the United Cigar Stores Company continues the same vigorous efforts which the Government has charged, to acquire anything like a monopoly in the retail trade of tobacco products.

We come now to an examination of the testimony of the only retailer whom the Government called as a witness—Mr. Schulte.

It is true that Mr. Schulte on his direct-examination testified that the average dealer will be less successful, and that a great many dealers will be forced out of business, if the general policy of this company is continued during the next five years. But upon cross-examination Mr. Schulte could not name a single retailer who had been forced to retire from business, or who had been injured. He conceded that he himself had been in the retail business for fifteen years; that he had prospered; that he had five stores when the United Cigar Stores Company commenced to operate in New York City, but at the time he was examined he had twelve, and that he was about to open a number of others, not only in New York but in other cities. And he testified (Vol. III, pp. 472-3).

> "Q. Your business has been a very profitable one, hasn't it, Mr. Schulte?
>
> "A. Yes.
>
> * * * * * *

"Q. How about Mr. Lane; has he more stores to-day than he had five years ago in New York City?

"A. I think he has more stands. More places for the sale of cigars and cigarettes at retail.

"Q How about Godfrey Mahn; has Godfrey Mahn more stores in New York City to-day than he had five years ago?

"A. Yes."

A time-worn misrepresentation concerning the Company is to the effect that it has leased locations in which competitors had carried on successful retail establishments, and thereby had forced the retirement of such competitors. Again, not a single witness testified that his location had been leased over his head, with the exception of Mr. Schulte. And he testified, in answer to the Assistant Attorney-General: "Yes; I have been driven out of two locations by the United Cigar Stores Company" (Vol. III, p. 465).

On cross-examination it developed that concerning both of these locations these were the facts:

The United Cigar Stores Company had gone in there originally and had established cigar stores in both of them—a business that had not been carried on before in either of those locations. The locations then obtained a good-will. Schulte, as a splendid successful competitive merchant, came along, bid higher rent (in one case increasing the rent from $9,500 to $16,500 a year) and got the leases away; and at the termination of his leases we got them back again (Vol. III, pp. 474-6). That is the only evidence in this entire Record of any retailer having a location taken away from him.

The Government further charges that this Company has bought out the business of a number of retailers, and in that way has forced their retirement. Again we refer to the Record.

Of the 409 stores operated by the United Cigar

Stores Company, almost every one was opened by it as a cigar store for the first time. Only a small number of these stores were purchased from other retailers; and of these, except in three or four instances, reference to which will be made in a moment, every one was at liberty to go right back into the retail business and in competition with this defendant—and the Record shows that most of them did. It further shows that they continued to be successful in that competition.

In the three or four instances in which this company bought out the business of other retailers, and took from them covenants for a limited period and for a limited territory not to engage in the retail cigar business, the man whose business was purchased not only entered into the employment of the company but became an active director and manager of its business in that particular territory; and, as the evidence shows, he shared in the general prosperity of the company.

The taking of this covenant was but an incident of the purchase of the good-will of the business, part of the sale of the business, and in no sense a device to control commerce. It was one of the conventional inducements of the purchase.

Conduct Toward the Consumer.

How has the public been affected by the operations of the United Cigar Stores Company? The Record does not suggest, even by inference, that the prices to the consumer were at any time raised, nor that the consumer was in any way hindered in procuring a supply of tobacco products. There is no suggestion of any agreement on prices—that is, with regard to the prices at which the goods should be bought by the United Cigar Stores Company, nor in regard to the prices at which they should be sold. There is no evidence in the Record of the cutting of prices to oppress other dealers. In fact,

every element of oppression is absent from the Record.

We submit that the tobacco business is such that no man nor any combination of men can monopolize or attempt to monopolize any part of it. The power inherent in all wealth is not sufficient for this purpose; and this is especially true of the retail business. The necessary or direct effect of any combination between the defendants was not to restrain commerce. The Record shows that no strangers to the combination were excluded from the trade; and it fails to show any attempt to exclude strangers. No means were adopted or used, or attempted to be used, which prevented or restrained others from engaging in the business. The Record fails to show that any effort was made to force a single retailer to sell out or to go out of business, or to interfere with any one in engaging or attempting to engage in business. Not only did the Government fail to produce one man whose business had been interfered with or injured, but it also failed to produce one man who had been driven out of business or prevented from entering it.

The Record shows that other retailers have profited by the example of this Company. They have kept their stores clean; they have dressed their windows attractively. They have given the public the goods which the public demanded; and as a result many of them have built up splendid businesses in competition with the Company. Their stores have come even to look like the stores of this Company and are often mistaken for them.

I submit that upon the Record, and upon the Record alone, the judgment of the Court below, so far as this defendant is concerned, should be affirmed.